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EDITOR'S NOTE

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(9)

o. 84-5786-CFH
tatus: GRANTED

Title: Frank M. Miller, Jr., Petitioner
v.
Peter J. Fenton, Superinterdent, Rahway State Prison, et al.

ocketed:
ovember 21, 1984

Court: United States Court of Appeals for the Third Circuit

Counsel for petitioner: Klein,Paul M.

Counsel for respondent: Paskow,Anne C..

ntry	Date	Note	Proceedings and Orders
1	Nov 21 1984	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Dec 17 1984		Brief of respondents Fenton, Supt., et al. in opposition filed.
4	Dec 20 1984		DISTRIBUTED. January 11, 1985
5	Feb 1 1985		REDISTRIBUTED. February 15, 1985
8	Mar 25 1985		REDISTRIBUTED. March 29, 1985
10	Apr 1 1985		Petition GRANTED.
12	Apr 19 1985		Order extending time to file brief of petitioner on the merits until June 7, 1985.
13	May 28 1985		Joint appendix filed.
15	May 30 1985		Brief of petitioner Frank M. Miller, Jr. filed.
16	Jun 5 1985		Brief amicus curiae of American Civil Liberties Union, et al. filed.
17	Jun 13 1985		Record filed.
18	Jun 14 1985	D	Motion of petitioner for divided argument filed.
20	Jun 24 1985		Motion of petitioner for divided argument DENIED.
21	Jun 28 1985		Record filed.
22	Jun 28 1985		Certified original record, 16 volumes, received.
23	Jul 16 1985		Brief of respondents Peter J. Fenton, Supt., et al. filed.
24	Jul 18 1985		SET FOR ARGUMENT, Wednesday, October 16, 1985. (4th case).
25	Aug 7 1985		CIRCULATED.
26	Oct 9 1985	X	Reply brief of petitioner Frank M. Miller filed.
27	Oct 16 1985		ARGUED.

PETITION FOR WRIT OF CERTIORARI

EDITOR'S NOTE

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84-5786

No. ____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

FRANK M. MILLER, JR., Petitioner,

v.

PETER J.FENTON, SUPERINTENDENT, RAHWAY STATE PRISON, and IRWIN I. KIMMELMAN, ESQ., ATTORNEY GENERAL, STATE OF NEW JERSEY, Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Frank M. Miller, Jr., asks leave to file the attached Petition for a Writ of Certiorari to the Supreme Court of New Jersey, without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Petitioner has previously been found to qualify for the services of the Office of the Public Defender at every stage of the proceedings in the courts of the State of New Jersey. Petitioner's affidavit in support of this motion is attached hereto.

JOSEPH H. RODRIGUEZ
Public Defender of New Jersey

BY: Paul M Klein
PAUL M. KLEIN
Assistant Deputy Public Defender

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

FRANK M. MILLER, JR., Petitioner,

v.

PETER J. FENTON, SUPERINTENT, RAHWAY
STATE PRISON, AND IRWIN I. KIMMELMAN, ESQ.,
ATTORNEY GENERAL, STATE OF NEW JERSEY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PAUL M. KLEIN
Counsel of Record

CLAUDIA VAN WYK

Assistant Deputy Public Defenders
20 Evergreen Place
First Floor
East Orange, New Jersey 07018

No. _____

IN THE

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OCTOBER TERM, 1984

FRANK M. MILLER, JR., Petitioner,

v.

PETER J.FENTON, SUPERINTENDENT, RAHWAY
STATE PRISON, and IRWIN I. KIMMELMAN, ESQ..
ATTORNEY GENERAL, STATE OF NEW JERSEY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The petitioner, Frank M. Miller, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this proceeding on August 17, 1984.

QUESTIONS PRESENTED

1. Whether the Court of Appeals, by construing as a finding of fact the state court's conclusion that petitioner's confession was voluntary, used the presumption of correctness in 28 U.S.C. §2254(d) to deprive this Court of the effective review of the voluntariness of confessions and to deprive petitioner of due process of law.

2. Whether confessions are violative of due process when obtained by police practices which employ deceit and false promises which operate to overbear a defendant's will.

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OPINIONS BELOW

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JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on August 17, 1984. A timely petition for rehearing en banc was denied on September 28, 1984, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amend. XIV:

> [N]or shall any State deprive a person of life, liberty, or property, without due process of law....

United States Code, Title 28 § 2254(d):

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondents shall admit--

> (1) that the merits of the factual dispute were not resolved in the State court hearing;
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
> (3) that the material facts were not adequately developed at the State court hearing;
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
> (5) that the applicant was indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
> (6) that the applicant did not receive a full, fair and adequate hearing in the State court proceeding; or
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7) inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State was erroneous.

STATEMENT OF THE CASE

How Federal Question Is Presented

Before his trial for murder, petitioner Frank M. Miller filed a timely motion to suppress statements he had made to the police as involuntarily made in violation of his right to due process of law. U.S. Const., Amend. XIV. The court held a hearing on petitioner's motion and denied it, ruling that his will had not been overborne. (T 142-20 to 147-3)* The Appellate Division of the New Jersey Superior Court reversed, holding the statements involuntary (Appendix at 24 to 40), and was itself reversed, after two arguments, by the New Jersey Supreme Court, which held in a four-to-three decision that the statements had not been obtained in violation of petitioner's right to due process. (Appendix at 41 to 61). Mr. Miller then petitioned for writ of habeas corpus in the United States District Court for the District of New Jersey. On February 23, 1983, United States Magistrate John W. Devine recommended that Miller's application be dismissed, but with a certificate of probable cause (Appendix at 62 to 68). On June 17, 1983, the District Court (Bissell, J.) filed an order and opinion dismissing Miller's application without an evidentiary hearing but granting a certificate of probable cause. (Appendix at 69 to 71). After petitioner filed a timely notice of Appeal (Appendix at 72), the Court

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* "T" indicates citations to the trial transcript.

of Appeals for the Third Circuit affirmed, with one judge dissenting, on August 17, 1984. (Appendix at 73 to 105) A timely petition for rehearing en banc was denied on September 28, 1984 (Appendix at 106).

The Hearing on the Motion to Suppress the Statement.

Detective Charles R. Boyce of the New Jersey State Police participated in two interviews of petitioner: one late on August 13, 1972, the date of the murder of Deborah S. Margolin, and another during the early morning of August 14.* Boyce made repeated references to Mr. Miller's mental "problem" to induce him to confess. (Appendix at 7, 8, 10, 16, 17) Over and over, he told him that he was not a "criminal" because he had a problem (Appendix at 8). Boyce persistently assured Mr. Miller that he was not responsible for his actions and that he would receive help, not incarceration, for confessing:

> Boyce: Frank, look you want, you want help, don't you, Frank?
>
> Miller: Yes, uh huh, yes, but yet I'm, I'm not going to admit to something that, that I wasn't involved in.
>
> B. We don't want you to, all we want you to do is talk to me, that's all. I'm not talking about admitting to anything, Frank. I want you to talk to me. I want you to talk to me. I want you to tell me what you think. I want you to tell me how you think about this, what you think about this?
>
> M. What I think about it?

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* Both interviews were taped, and a transcript of the second, held at the Flemington Police Barracks, appears in the appendix hereto at 1 to 23.

B. Yeah.

M. I think whoever did it really needs help.

B. And that's what I think and that's what I know. They don't, they don't need punishment, right? Like you said, they need help.

M. Right.

B. They don't need punishment. They need help, good medical help.

M. That's right.

B. ...to rectify their problem. Putting them in, in a prison, isn't going to solve it, is it?

M. No sir. I know, I was in there for three and a half years.

* * *

B. Now, don't you think it's better if someone knows that he or she has a mental problem to come forward with it and say, look, I've, I've, I've done these acts, I'm responsible for this, but I want to be helped, I couldn't help myself, I had no control of myself and if I'm examined properly you'll fine out that's the case. Is that right or wrong.

(Appendix at 9-10; emphasis supplied)

Boyce then attempted to convince Mr. Miller, contrary to his inclinations, that the real responsibility lay with the inadequate psychiatric treatment that he had received as a condition of parole. (Appendix at 11) He specifically promised to get psychiatric treatment for petitioner if he would confess, then returned to his arguments that petitioner was not responsible for his actions and was not a criminal. (Appendix at 12, 15)

Boyce used deceit as well as express and implied promises. Early in the interview he said that the victim had just died to support another officer's earlier inducement to confess, namely, that she was still alive and could identify her attacker. (Appendix at 10; T 109-1 to 4) At trial, the detective admitted that he had known the victim was dead since seven o'clock that night. (T 305-4 to 5) Similarly, Boyce told Mr. Miller that he had been identified as being at the Margolin home earlier in the day. In fact, he had not been identified. (Appendix at 9; T 169-18 to 24)* He also told petitioner that blood stains had been found on his front stoop. (App. at 6) No such evidence was introduced at trial. The tape reveals Miller sobbing thirty minutes into the interrogation, distraught, weak, and unstable.

The interview ended abruptly when Mr. Miller lost consciousness and was taken to a hospital. (T 84-3 to 85-17) He could later remember nothing of the police barracks interview. (T 108-11 to 109-9) At the time of the interrogation petitioner was thirty-three years old with a ninth grade education. (T 106-23 to 107-8) He had been convicted of a crime in 1969 and arrested recently for a violation of parole on another crime. (T 78-12 to 21) He had undergone psychiatric treatment before his original incarceration and had been evaluated by psychiatrists once in prison and two or three times after his release. (T 114-13 to 24)

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* The victim's brothers had given a very general physical description of an average looking man dressed like a factory worker.

The Trial

Deborah Margolin, seventeen years old, lived with her parents and three brothers on a farm in East Amwell Township, New Jersey. (T 155-9 to 156-14) On the morning of August 13, 1973, she was sunbathing on the patio of the farmhouse. Her brothers, Daniel and Bernard, were in the house and observed the events that followed from upstairs windows overlooking the patio.

At about 11:30 a.m. a white car drove up the driveway and sounded the horn several times. It was dusty, had its trunk tied shut, and had two severe dents in its side. (T 166-10 to 17; T 167-4 to 11; T 179-12 to 180-16) Deborah approached the driver, who told her that a heifer was lose at the bottom of the driveway. He left after she declined his offer of help; she then drove down the driveway herself in a family car. (T 167-23to 168-24; T 169-13 to 16)

Later that afternoon, when Deborah failed to return home, a search of the area was made. Her father found her body in a nearby creek with her throat slashed. (T 157-7 to 162-23)

Late that night Detectives Boyce and Doyle interviewed Mr. Miller in the parking lot of the P.F.D. Plastics Factory, where he worked. (T 211-1 to 212-7; T 272-7 to 13) Later he accompanied them to the Flemington Police Barracks, where he made the statement now at issue. Although both statements had been recorded, the jury heard only a redacted portion of the second. (T 288-15)

The jury convicted Mr. Miller of murder in the first degree (T 511-8 to 19), and he was sentenced to life imprisonment.

POINT I

THE COURT OF APPEALS, BY CONSTRUING AS A FINDING OF FACT THE STATE COURT'S CONCLUSION THAT PETITIONER'S CONFESSION WAS VOLUNTARY, USED THE PRESUMPTION OF CORRECTNESS IN 28 U.S.C. § 2254(d) TO DEPRIVE THIS COURT OF EFFECTIVE REVIEW OF THE VOLUNTARINESS OF CONFESSIONS AND TO DEPRIVE PETITIONER OF DUE PROCESS OF LAW.

The facts in this case have never been in dispute. A complete tape recording and transcript (see Appendix at 1 to 23) conclusively establish all relevant facts except a few uncontroverted items such as petitioner Miller's age, record, psychiatric background, and loss of consciousness immediately after the interrogation. Yet the Court of Appeals for the Third Circuit abdicated its duty to decide whether Mr. Miller confessed voluntarily or involuntarily by deferring to the New Jersey Supreme Court's holding on that question as a finding of fact subject to the presumption of correctness set forth in 28 U.S.C. § 2254(d). The decision in effect held that over fifty precedents of this Court had been overruled sub silentio, and it conflicted with decisions by Courts of Appeals in eight circuits. Since the decision also raises an important question -- the extent of federal courts' power of review, if any, over the voluntariness of confessions -- Mr. Miller petitions this Court for writ of certiorari.

For almost fifty years, this Court has treated voluntariness as a question of law. Beginning with direct appeal cases such as Brown v. Mississippi, 297 U.S. 278, 286 (1936), and Chambers v. Florida, 309 U.S. 227, 228 (1940), the Court conducted plenary review of the question on the basis of undisputed historical facts. Chambers, 309 U.S. at

229, 238-39. The policy prevented the states from frustrating federal rights through distorted fact-finding. Haynes v. Washington, 373 U.S. 503, 515-16 (1963); Stein v. New York, 346 U.S. 156, 181 (1953).

The first coerced confession cases to reach the Court in habeas corpus broadened and refined the federal courts' fact-finding power. Brown v. Allen, 344 U.S. 443, 457-58, 464 (1953), held that the 1867 Habeas Corpus Act creates the power in appropriate cases to readjudicate state court factual findings. In addition, conclusions of mixed law and fact were never binding:

> Where the ascertainment of the historical facts does not dispose of the claim, but calls for interpretation of the legal significance of such facts. . .the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.

Id. at 507 (concurring opinion of Frankfurter, J.)(citations omitted). Townsend v. Sain, 372 U.S. 293 (1963), and the 1966 amendments to the Habeas Corpus Act, 28 U.S.C. § 2254(d) (1-8), limited federal courts' ability to readjudicate questions of historical fact, but neither affected their duty to determine mixed questions of law and fact independently. Townsend, 372 U.S. at 309 n. 6.

The most explicit affirmation that voluntariness is a mixed question subject to plenary review came in Culombe v. Connecticut, 367 U.S. 568 (1961). The inquiry into voluntariness was "a three-phrased process" entailing, first, a finding of external events or historical facts, second, "imaginative recreation" of the defendant's mental state,

and, third, application of legal standards which themselves "comprehend both induction from, and anticipation of, factual circumstances." Id. at 603. The first phase was a determination of fact, but the second and third were "amphibian," involving inferences about both the defendant's reaction to external events and their legal significance. Id. at 604-05. This classification was essential to enforce constitutional rights:

> No more restricted scope of review would suffice adequately to protect federal constitutional rights for the mental state of involuntariness upon which the due process question turns can never be affirmatively established other than circumstantially -- that is, by inference, and it cannot be competent to the trier of fact to preclude our review simply by declining to draw inferences which the historical facts compel.

Id. at 609.

Since this Court established prophylactic rules for interrogations in Miranda v. Arizona, 384 U.S. 436 (1966), it has addressed the voluntariness of a confession only once, in Mincey v. Arizona, 437 U.S. 385 (1978); cf. Nutto v. Ross, 429 U.S. 28 (1976) (per curiam) (defendant, after pleading guilty but independently of plea bargain, voluntarily confessed). There too the Court held that the state court's volunariness determination was not binding:

> [W]e are not bound by the Arizona Supreme Court's holding that the statements were voluntary. Instead, this Court is under a duty to make an independent evaluation of the record.

Mincey, 437 U.S. at 398.

Thus, the Third Circuit's holding in Mr. Miller's case directly contradicts almost fifty of this Court's decisions. It also conflicts with the law in the Courts of

Appeals for eight circuits. In Johnson v. Hall, 605 F.2d 577, 580 (1st Cir. 1979), the court held that its duty was to make an "independent" determination of voluntariness. Accord, Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980), cert. denied 450 U.S. 1014 (1981); Fowler v. Jago, 683 F.2d 983, 992 (6th Cir. 1982). In another case very similar to Mr. Miller's, Lyle v. Wyrick, 565 F.2d 529, 531 (8th Cir. 1977), the defendant claimed that his interrogators had implicitly promised him psychiatric help instead of prosecution if he would make a statement. The court, applying LaVallee v. Delle Rose, 410 U.S. 690 (1973), assumed that the trial judge had held the confession voluntary because he discredited the defendant's version, not because his testimony if true failed to establish the confession's involuntariness. Id. at 532. On that assumption, the state court's finding should be presumed correct. Id.

Similarly, the First and Ninth Circuits have made independent determinations of voluntariness as a matter of law in direct appeal cases. United States v. Tingle, 658 F.2d 1332, 1335 (9th Cir. 1981); United States v. Bienvenue, 632 F.2d 910, 913 (1st Cir. 1980). Three circuits have treated voluntariness as a question of law in habeas cases without specifically discussing the issue. United States v. Castaneda-Castaneda, 729 F.2d 1360, 1362 (11th Cir. 1984); Holleman v. Duckworth, 700 F.2d 391, 396 (7th Cir. 1983); United States v. Robinson, 698 F.2d 448, 455 (D.C. Cir. 1983).

The Third Circuit in this case joins only the Second and Fourth in deciding that voluntariness is a question of

fact subject to the presumption of correctness. Alexander v. Smith, 582 F.2d 212 (2d Cir. 1978); Miller v. Maryland, 577 F.2d 1158 (4th Cir. 1978). The Tenth Circuit, in Castleberry v. Alford, 666 F.2d 1338, 1342 (10th Cir. 1982), has held that the question may be mixed, pure fact, or pure law, depending on the circumstances. Finally, in Williams v. Maggio, 727 F.2d 1387, 1390 (5th Cir. 1984), perhaps undercutting Jurek, supra, 623 F.2d 929, the Fifth Circuit cryptically treated voluntariness as a question of fact subject to the presumption of correctness because the defendant had challenged the statement "solely as a matter of historical fact." The court did not say what it would have done if defendant had challenged the statement's voluntariness as a matter of law.

In addition to conflicting with decisions of other circuits, the holding in this case presents an important question: whether three recent decisions of this Court, two of them summary per curiam reversals and none of them on point, have overruled almost a half century of precedent on voluntary confessions sub silentio. See Rushen v. Spain, 104 S.Ct. 453 (1983) (per curiam); Maggio v. Fuford, 103 S.Ct. 2261 (1983) (per curiam); Marshall v. Lonberger, 103 S.Ct. 843 (1983). The majority's implicit conclusion that Marshall in particular has done so could only result from confusion about recent applications of the presumption of correctness which this Court should correct.

Townsend v. Sain, 372 U.S. 293, the precursor of 28 U.S.C. § 2254(d), was itself a voluntariness case and made clear that the federal courts owed deference to state findings only on purely factual questions:

> By "issues of fact" we mean to refer to what are termed basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators. . .So called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense.

Id. at 309 n. 6 (citations omitted). Recent years have seen broader application of the presumption of correctness. Sumner v. Mata, 455 U.S. 591 (1982) (state findings on the five factors underlying the determination whether an identification procedure is suggestive are entitled to presumption). As a result the Court has applied or declined to apply the presumption in a variety of contexts. Wainwright v. Witt, 52 USLW 3725 (April 3, 1984) (certiorari granted to decide whether presumption applies to state court's finding on juror's impartiality on capital punishment question); Marshall v. Lonberger, ____ U.S. ____, 103 S.Ct. 834 (1983) (question whether plea voluntary not subject to presumption, but inferences from record about whether defendant understood charges are subject); Maggio v. Fulford, ____ U.S. ____, 103 S.Ct. 2261 (1983) (presumption applies to question whether defendant was competent to stand trial); Rushen v. Spain, ____ U.S. _____, 104 S.Ct. 453 (1983) (presumption applies to question whether one possibly prejudiced juror tainted other jurors); Patton v. Yount, ____ U.S. ____ 104 S.Ct. 2885 (1984) (presumption applies to partiality of individual juror).

These varying applications of the presumption in different circumstances have evidently produced some confusion. For example, in Marshall, supra, 103 S.Ct. at 849, which addressed the voluntariness of a guilty plea, a

closely related question to the voluntariness issue in Mr. Miller's case, this Court held:

> We entirely agree with the Court of Appeals for the Sixth Circuit that the governing standard as to whether a plea of guilty is voluntary is a question of federal law, and not a question of fact subject to the requirements of 28 U.S.C. § 2254(d). But the questions of historical fact which have dogged this case since its inception -- what the Illinois records show with respect to respondent's 1972 guilty plea, what other inferences regarding those historical facts the Court of Appeals for the Sixth Circuit could properly draw, and related questions -- are obviously questions of "fact" governed by the provisions of § 2254(d) (emphasis added).

Although the only "inference" at issue in Marshall involved the credibility of defendant's claim that no one informed him of the most serious charge to which he was pleading guilty, id. at 851-53, the Third Circuit in Mr. Miller's case applied the presumption to inferences about his mental state during the interrogation. Slip op., appendix at 85. See also Patterson v. Cuyler, 729 F.2d 925 (3d Cir. 1984). However, unlike Marshall, this case involves no credibility disputes, and inferences about defendant's mental state during a confession are necessarily and inextricably intertwined with constitutional standards. See Culombe, supra, 367 U.S. at 604-05. The presumption of correctness never applies to such mixed questions of law and fact. See Strickland v. Washington, ___ U.S. ____, 104 S.Ct. 2052, 2070 (1984); Cuyler v. Sullivan, 446 U.S. 335, 342 (1980).

At least one member of this Court has observed that the question of the correct standard of review for the issue of voluntariness in a habeas case "is important and should be resolved by the Court." Estelle v. Jurek, 450 U.S. 1014,

1019 (1981) (Rehnquist, J., dissenting from denial of certiorari).* In order to retain federal review of voluntariness questions, this Court must make clear that the defendant's state of mind and the ultimate question of voluntariness are mixed questions of law and fact to which 28 U.S.C. §2254(d) does not apply. See Culombe, 367 U.S. at 604.

Since the standard for voluntariness is the totality of the circumstances, voluntariness is inevitably a mixed question. However, some factors in the voluntariness equation are particularly non-factual because they are rule-related or prescriptive rather than subjective. So long as no dispute exists about what happened during interrogation, it would strain logic to characterize as factual the prescriptive elements, which lay down rules for police questioning suspects.

Perhaps the most important element in Mr. Miller's case is rule-related or prescriptive. Just as interrogating police may not properly keep a defendant ignorant of his true legal rights, Davis v. North Carolina, 384 U.S. 737, 740-41 (1966), neither may they create fictitious legal rights to persuade him to confess. That is, they may not deceive him about his legal position or make promises which they have no authority to keep. E.g., Hutto v. Russ, 429 U.S. 28, 30 (1976); Brady v. United States, 397 U.S. 742, 754 (1970); Bram v. United States, 168 U.S. 532 (1897). This principle involves rules, not the

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* Petitioner does not agree, however, that the Court has never explicitly applied the independent review standard in a voluntariness case. Id. at 1019; contra, Mincey v. Arizona, 437 U.S. at 398; Haynes v. Washington, 373 U.S. at 515.

defendant's state of mind. Without question, a defendant who confesses after receiving false promises freely chooses to do so. In Mr. Miller's case, if it had been true that he could avoid criminal prosecution and receive psychiatric help by making a statement, his decision to speak would have been an act of supreme self-determination. The constitutional infirmity in question resides not in his will or his mind but in police behavior -- providing him with false data on which to base his decision (see Point II infra at 21-22).

One federal court, unlike all others, has held that voluntariness is sometimes a mixed question and sometimes purely legal or factual, depending on the factors involved. Castleberry v. Alford, 666 F.2d 1338, 1342 (10th Cir. 1982). If this Court decides that the subjective factors in the voluntariness determination are issues of fact subject to the presumption of correctness, it will be imperative to consider whether to retain federal supervision of the prescriptive factors by treating them as mixed or legal questions.

Mr. Miller has been denied his right to have a federal court decide on the merits whether the police used unconstitutional procedures to interrogate him and whether the totality of the circumstances rendered his confession involuntary. He therefore asks this Court to grant his petition for writ of certiorari to resolve the conflict of among the circuits on this issue, to correct the Third Circuit's contradiction of the well-settled law of this Court, and to make clear the federal courts' duty of plenary review of the question of voluntariness.

POINT TWO

CONFESSIONS ARE VIOLATIVE OF DUE PROCESS WHEN OBTAINED BY POLICE PRACTICES WHICH EMPLOY DECEIT AND FALSE PROMISES AND WHICH OPERATE TO OVERBEAR A DEFENDANT'S WILL.

At issue here is the acceptability of police tactics which employ express promises of psychiatric help and implied promises of non-incarceration as well as trickery and deception to elicit a confession of guilt. This Court is being called upon to reaffirm its commitment to the principle that evidence of a confession is incompetent in a constitutional sense and thus inadmissible, when it has been induced by promises and deceit and which, under the totality of circumstances, operate to overbear an individual's will. This Court will be scrutinizing what the New Jersey Appellate Court characterized and the dissenting opinion in the Third Circuit Court of Appeals recognized as "tremendous psychological pressure" resulting in a confusion born of "intense and mind-bending psychological compulsion," and an interrogation described as a "will-abrading grind" interrupted with "relentless and successful Svengalian efforts."

The tape of the confession reveals that from the outset of the interrogation the interrogating detective lied to petitioner by telling him that petitioner had been identified talking to the victim minutes before she was murdered. (Appendix at 9) In fact the detective had no such information and no identification of petitioner was made at trial. The detective represented that the blood stains of the victim were found on the "front stoop" of petitioner's house. No such evidence was introduced at

trial. The interrogation continued with falsehoods, including the assertion that the victm was alive and could identify her assailant. The false impression was also given that the victim had described her assailant. (Appendix at 10) In fact, both interrogating officers knew that the victim had died hours earlier leaving no description of her assailant.

The initial deceptions were followed by approximately 45 minutes of intensive, relentless questioning during which the detective barraged petitioner with express promises of help and implied promises of no criminal culpability if he would confess. On no less than 41 occasions did the detective urge petitioner to admit that he needed help to solve his problem and that the detective would provide the help if petitioner would confess. On at least 12 occasions the detective emphasized that petitioner would not be held responsible for his actions and thus could not be held accountable for the murder, that the incident was not petitioner's fault and that petitioner was not in need of punishment. As Judge Gibbons noted, thirty minutes into the interrogation, petitioner was sobbing, "distraught, weak and unstable." (Appendix at 87) At the conclusion of the interrogation, petitioner went into a state of shock, slid off of his chair onto the floor, unconscious, and was transported by ambulance to the hospital. Since petitioner collapsed after the confession, the police were unable to obtain a signed statement. Consequently, this case provides us with a rare behind-the-scenes look at the inducements used to obtain confessions free of credibility issues.

The majority opinion in the Third Circuit Court of Appeals decided that the question of whether the totality of circumstances combined to overbear petitioner's will was one of fact and deferred to the state court's finding that petitioner's confession was voluntary. However, it failed to address the crucial issue regarding the procedures employed to elicit the confession. Clearly, courts deciding the question of whether defendant's confession is voluntary under the totality of the circumstances address not only the question pertaining to his state of mind but also the procedures used to interrogate him.

Petitioner contended that the investigating detective's deception and promises, by themselves, violated his right to due process of law. This contention is consistent with this Court's decisions in Bram v. United States, 168 U.S. 532 (1897); Malloy v. Hogan, 378 U.S. 1, (1964); and Brady v. United States, 397 U.S. 742 (1970). The majority below abdicated its duty of plenary review of this legal issue by merely deferring to the state court's finding that petitioner's will was not overborne.

Until this Court incorporated the Fifth and Sixth Amendments into the Fourteenth, Malloy v. Hogan, 378 U.S. 1,12 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963), it could review confessions used in state proceedings only under the Fourteenth Amend-ment's due process clause. Its voluntariness doctrine amalgamated widely assorted principles. Sometimes the court conducted a philosophical inquiry into the defendant's free will. E.g., Columbe v. Connecticut, 367

U.S. 568, 602 (1961) (question is whether defendant's "capacity for self-determination" is "critically impaired"); Blackburn v Alabama, 361 U.S. 199 (1960) [defendant's long psychiatric history made it unlikely confession was the product of "rational intellect" and "free will"]; Fikes v Alabama, 352 U.S. 191 (1957) (defendant's small "power of resistance" to a week's interrogation, because of his low intelligence, rendered confession involuntary). At other times, it laid down rules for humane police interrogation. E.g., Darwin v. Connecticut, 391 U.S. 346 (1968) (30 to 48 hours of incommunicado interrogation); Beecher v. Alabama, 389 U.S. 35, 38 (1967) (gunpoint confession to officer who had already shot defendant in the leg); Spano v. New York, 360 U.S. 315 (1959) (police officer who was childhood friend pleads with defendant to save his job). Indeed, as the majority in this case observed, perhaps the chief function of the "voluntariness" inquiry was "to check outrageous interrogation practices." (Appendix at 82)

With incorporation the court began to transplate its rules of police conduct to more fertile constitutional soil. In Miranda v. Arizona, 384 U.S. 436 (1966), the Fifth Amendment privilege against self-incrimination served as the ground for one seminal rule: law enforcement authorities may not keep a defendant ignorant of his true legal rights. Cf. Davis v. North Carolina, 384 U.S. 737 (1966) (before Miranda, whether defendant learns constitutional rights was an important factor in determining voluntariness). Another rule, untended by the Court in recent years and thus

apparently still rooted in due process, is that law enforcement authorities may not create fictitious legal rights to persuade a defendant to confess. That is, they may not deceive him about his legal position or make promises which they have no authority to keep. E.g., Bram v. United States, supra; Schmidt v. Hewitt, 573 F.2d 794 (3d Cir. 1978); Wright v. North Carolina, 483 F.2d 405 (4th Cir. 1973).

The Miranda doctrine's separate constitutional ground demonstrates the logical independence of the several aspects of the voluntariness doctrine. Like the rule requiring Miranda warnings, the rule against police deception and promises involves very different concerns from defendant's state of mind. Without question, a defendant who confesses after receiving false promises operates as a free agent. In petitioner's case, if it were true that he could avoid criminal prosecution and obtain psychiatric help by making a statement, his decision to do so would be highly rational and self-actualizing. The constitutional infirmity resides not in his will or his mind but in police behavior -- providing him with false data on which to base his decision whether to speak. The point of telling a suspect that anything he says can be used against him is to sharpen the suspect's awareness of his position. As the Miranda majority stated: "[T]his warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system -- that he is not in the presence of persons acting solely in his interest." 384 U.S. at 469. At least some degree of distortion of the Miranda warnings occurs whenever the police make a misstatement that relates

to the legal effect of the suspect's exercise of his right to remain silent.

In light of the above and in light of the conduct the police exhibited here, this Court must reaffirm its commitment to the principle that evidence of a confession is inadmissible when it has been induced by tactics employing promises and deceit and when such tactics operate to overbear a defendant's will. This principle must apply both when the promise is explicitly or implicitly articulated, as long as the police suggestion is likely to induce a suspect to believe that his legal position -- here, petitoiner's relationship with the criminal justice system -- will improve if he confesses or deteriorate if he remains silent.

Respectfully submitted,

Paul M. Klein

PAUL M. KLEIN
Counsel of Record

CLAUDIA VAN WYK
Assistant Deputy Public Defenders
20 Evergreen Place
First Floor
East Orange, New Jersey 07019

84-5786

ORIGINAL

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

FRANK M. MILLER, JR., Petitioner,

v.

PETER J. FENTON, SUPERINTENT, RAHWAY STATE PRISON, AND IRWIN I. KIMMELMAN, ESQ., ATTORNEY GENERAL, STATE OF NEW JERSEY,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PAUL M. KLEIN
Counsel of Record

CLAUDIA VAN WYK

Assistant Deputy Public Defenders
20 Evergreen Place
First Floor
East Orange, New Jersey 07018

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?

NO

3. Do you own any cash or checking or savings account?

NO

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

NO

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Frank M. Miller Jr.
FRANK M. MILLER, JR.

Subscribed and sworn to before me
this 5th day of November, 1984.

INDEX TO APPENDIX

(B - Detective Boyce)

(M - Frank Miller)

B. Testing 1 2 3. Testing 1 2 3. (cough) Testing 1 2 3. Testing.

B. Tuesday, (cough), Tuesday, August 14, 1973, 1:47 A.M., Flemington State Police Barracks, Detectives' room, this is the start of an interrogation between Detective William Doyle, 1884, New Jersey State Police, Detective Boyce, 2097, also from the New Jersey State Police and one Frank Melvin Miller, and this interrogation is in reference to the investigation now being conducted which involves the death of Miss Deborah Selma Margolin, white female, age 17, Brown Station Road, R.D. Ringoes, New Jersey, That's a correction, that's Bowne Station Road. This death occurring sometime approximately between 11:15 A.M., 8/13/73, and 5:45 P.M., 8/13/73.

B. Now, Mr. Miller, uh Frank, I talked to you earlier.
M. Yeah, at PFD.

B. At PFD where you're employed. I was accompanied by Trooper Robert Scott at that time.
M. Yes, sir.

B. We identified ourselves and we spoke to you on a voluntary basis in which you extended your cooperation to us, uh, in regards to this investigation of the death of the girl that I have just mentioned.
M. Yes, sir.

B. You agreed at that time, voluntarily, to speak with us in regards to this matter. . .
M. Yes, sir.

B. . . . also gave us permission while we were there to look at your vehicle . . .
M. Yes, Sir.

B. . . . to take clothing from your locker. . .
M. Yes, Sir.

B. . . . which is located inside the PFD plant, all of this being done, of course, with the cooperation that was extended to us from you on a voluntary basis.
M. Right.

B. Now, Frank, you've been here since approximately 11, 11:49 P.M. which would actually be yesterday, 8/13/73. What I'm going to do at this time and, of course, let me just reiterate here, you, you, you came down, you accompanied Trooper Scott and myself here on a voluntary basis, is that correct?
M. Right.

B. Okay, and of your own free will?
M. Yes, sir.

B. Without duress?
M. Yes, sir.

B. Or having been threatened to do so?
M. Right.

B. Okay, and while you were here you've been conversing, again on a voluntary basis, with Trooper Scott, is that not right?

M. Yes, sir.

B. Okay, (cough). What I'm going to do at this time, as I've indictated already, you've been here for awhile, it is now almost 2:00 A.M. on the 14th, which puts you here approximately 2 hours. I'm going to advise you at this time of your constitutional rights, which you are entitled to, and start off by saying: Number 1, you have the right to remain silent and not to answer any questions, Number 2, if you decide to waive your right to remain silent, anything you say will be used against you if it is incriminating in nature. You have the right to be represented by an attorney before and during any questioning. If you want an attorney and cannot afford one, an attorney will be provided for you free by the State of New Jersey. Do you understand these rights, Frank?

M. Yes, sir.

B. Are you willing to talk to us without having an attorney? In reference . . .

M. Yes.

B. . . . to the, what we have talked about?

M. Yes.

B. Okay, fine.

M. But, at any time though, I can, uh, say no, right?, I mean, you know . . .

B. Yes, Frank, let me, let me go over that again.

M. Yeah, I understand that, that. . .

B. You understand your rights, Frank?

M. Yeah.

B. Okay. (cough) You may stop at anytime during this interrogation . . .

M. Yeah.

B. . . . and request to remain silent and we will honor your request.

M. Yes.

B. Okay?

M. Yeah.

B. Now, we're talking about the death of a young girl, Frank, right?

M. Yes, sir.

B. . . . very attractive, a very attractive young girl, who apparently at the time of her death was wearing nothing but a bathing suit, two piece bathing suit. We feel that there's a sexual aspect at this time is a good indication that there is some type of sexual assault that's associated with this crime. . . . Before we continue, Frank, what I would like to ask you to do is, I'm going to ask you t[illegible] the back of this card, okay, with your rights on it, indicating that you in fact have been. . .

M. Yeah, yeah. . .

B. . . . advised of your rights.

M. I got a pen right here.

B. Just sign the back of that and date it. (clanging noices). Today's the 14th.

M. You want it signed the 14th?

B. Yes, please.

M. Alright.

B. Okay.

M. Alright?

B. Thank you. Now, getting back to the, uh, the death of Miss Margolin, which we were discussing, you already related to me and Trooper Scott at the time in which you did it that as to where you were and what your activities were yesterday.

M. Right, right.

B. You indicated you came back into the Ringoes area about 11:00 A.M., is that correct?

M. It was somewheres in there, yeah, give or take a little bit of time.

B. Let's try and narrow that down, Frank. Can you think of anything that would give you any indication as to why you say now you came back into the area sometime around 11 o'clock.

M. Well, this is what I tol[illegible]ou at the barracks, or I mean at PFD. I figured it was between 11, uh, around 11 o'clock, because I figured I got home around 11:30, quarter to 12, back at my parents' house and I had stopped at the Post Office in Ringoes to mail a letter which I forgot to mail this morning, or yesterday morning.

B. Alright, but, in other words what I'm saying Frank is how can you substantiate in your mind, in your mind. . .

M. Uh, huh.

B. . . . as to wh. ., how, why you feel at this time that you arrived in Ringoes, went to the Post Office around 11 o'clock, can you tell me how you come to this conclusion, or what was, what activity you were involved in prior to getting, getting into Ringoes that would come to your mind as, you know, making you think that you arrived in Ringoes at 11 o'clock?

M. Well, because I was home around 11:30, quarter to 12, because, uh, so I figured, uh, it had to be somewheres around 11 o'clock that I was in Ringoes, that's about the only thing I can think of.

B. Alright, now, before, when I confronted you with the time element, you said that you were in Ringoes at 11, you got home around 12 o'clock, now, you say 11:30 or quarter to 12. Now, I'm going to ask you a question, how long does it take you to drive your vehicle from the Ringoes Post Office to your father's house?

M. That depends on how fast you go.

B. Okay, let's say if you drive at a normal rate of speed.

M. I'd say maybe 20 minutes.

B. 20 minutes. How far would you say it is, Frank?

M. Oh, 6,7 miles, maybe.

B. 6, 7 miles. Now, you've indicated once prior to this interrogation that you got home around 12. Now you've indicated 11:30, quarter to 12. Now, what time did you get home, Frank?

M. I'm not exactly sure.

B. Now that, now you're not sure.
M. Well, I, I say, uh, I figure anywheres from 11:30 to 12 o'clock, quarter to 12, somewheres around there. . .

B. Alright . . .
M. . . . because I didn't look at the clock.

B. Okay. Why do you think it was somewhere around there?
M. Because I got myself something to eat and, uh, got my stuff together to get ready to go to work, and I wanted to stop up the hospital to see how this fella was . . .

B. What time did you leave, how long were you, what time did you arrive at the Post Office? Approximately?
M. I'd say around 11 o'clock.

B. Okay, how long were you in the Post Office, Frank?
M. A few minutes is all.

B. A few minutes. What did you do when you walked outside, Frank?
M. Got in my car.

B. And went where?
M. Home.

B. Okay, Frank. You indicated it takes approximately 20 minutes to drive home.
M. Approximately, yeah.

B. Therefore, you would have arrived home in the area of 11:15, 11:20 A.M., but you indicated to me on 4,5, maybe 6,7,8,9 occasions already that you arrived home between quarter to 12, 12 o'clock. Now, I'm . . . am I right?
M. Yeah.

B. Okay, now, this is a problem.
M. I realize this. . .

B. This creates a very serious problem.
M. Times, I uh, you know, I uh . . .

B. Oh, well, you know, it's not so much times, knowing what time it is, but you do know how long it takes you to get from point A to to point B, you've already indicated . . .
M. Yeah, approximately.

B. Approximately 20 minutes.
M. Right.

B. So that's 11:15, 11:20.
M. Right.

B. 12 o'clock comes to your mind and I see a 40 minute, anywhere from a half hour to a 40 minute period. . .where are we, where are you, is what I should say?
M. Yeah.

B. And I, I just, you know, this, this, I have a big question mark in my mind right now.
M. Right.

B. Do you see my point, Frank?
M. Yes, sir.

B. That's point one. Your car, right now . . .
M. Yeah.

B. . . . is dented on the right side?
M. Right.

B. Your trunk is, I should, maybe I should use the words sprang down, because that is some type of a metal spring . . .
M. Right, yeah.

B. . . . securing the trunk of your vehicle. There is red dust on the vehicle, red dust that is visible to the naked eye . . .
M. Yeah.

B. . . . when someone looks at it. It's got red clay or dirt in and around the wheel covers . . .
M. Uh, huh.

B. . . . tires. I'll bet you right now, Frank, there is not another vehicle in Hunterdon County that fits the physical description that we, that Trooper Scott and I saw your vehicle in when we saw it up there tonight. I'll bet you, that I, I can call up a thousand people right now and there will not be another vehicle that fits the description of your vehicle. Am I right?
M. There shouldn't be, no, not with the right side of it dented in like that.

B. That's the second point. You're with me now, right?
M. Yeah.

B. Okay. Your vehicle was involved in an accident, was involved in two accidents.
M. Two accidents.

B. There was blood found on the left front interior portion of your vehicle, tonight, fresh blood.
M. Fresh blood?

B. Yes, sir. This is very, very serious.
M. I realize this.

B. That's point 3. Now, you live a few miles from the scene where this young, innocent, girl was found.
M. Uh, huh.

B. You indicate that between 11 and 12 yesterday morning, between 11 and 12, one hour, 60 minutes, you went from, according to your statement . . .
M. Right.

B. . . . the Ringoes Post Office to your house, a trip admitted to me by yourself that takes maybe 20 minutes.
M. About 20 minutes, right.

B. You wear, and you have a lot of, dark blue trousers.
M. Right.

B. You have a lot of light blue shirts.
M. Right.

B. I know, I have a lot of them in my custody now. We went to your house last night and found blood stains on the front stoop.
M. On the front stoop?

B. Yes, sir.
M. Well, how did it get there?

B. I don't know Frank. Let me ask you, how did it get there?
M. I have no idea.

B. We obtained a sample of the blood.
M. Right.

B. Obtained a sample from the vehicle.
M. Uh, huh.

B. We have a witness, Frank, now this is point 4. We have a witness who identified your car, who, no, I'm, I'm sorry, let me, I shouldn't say your car, who identified a vehicle that fits the description of your car, at this girl's home, speaking with her, telling her something about a cow being loose. Someone who was there who wanted to help her, they didn't want to hurt this girl, they didn't want to hurt this girl, Frank, they wanted to help her. You see, I know this, I know that, . . .
M. Yeah.

B. . . . because I can appreciate that, because I would have done the same thing. If there was something to be rectified, or if somebody had a problem, I would have done the same thing. I would have wanted to help her. The vehicle that came onto the property . . .
M. Right.

B. . . . fits the description of your vehicle.
M. It does.

B. Yes. Now, that's the fourth point. And when I say fits the description, what I mean, Frank, is it fits the description to a "t", and as we talked about before, how many other vehicles are there like yours in the County right now?
M. There shouldn't be too many, if any. . .

B. If any. .
M. . . . because of the damage on the righthand side.

B. Now, what would your conclusion be under those circumstances, if someone told you that?
M. I'd probably, uh, have the same conclusion you got.

B. Which is what?
M. That I'm the guy that, that did this.

B. That did what?
M. Committed this crime.

B. What crime?
M. Well, you said before the girl was dead, killed, killed this girl.

B. Who killed this girl?
M. The guy driving this car.

B. I think the guy driving this car. . . wait, let me, I forgot something. . . we have a physical description. . .
M. Uh, huh.

B. . . . of this individual from another witness. The physical description, Frank, . . .
M. Yeah.

B. . . . fits you and the clothes you were wearing. Frank, I don't think you're a criminal. I don't think you're a criminal. I don't think you have a criminal mind. As a matter of fact, I know you don't have a criminal mind, because we've been talking now for a few hours together, haven't we?
M. Right.

B. Right?
M. Yeah.

B. You don't have a criminal mind.
M. No.

B. I know you don't. But, like I noted before, we all have problems.
M. Right.

B. Am I right?
M. Yeah, you said this over there at the plant.

B. And you agree with me?
M. Yes, sir.

B. I have problems and you have.
M. Right.

B. Now, how do you solve a problem?
M. That depends on the problem.

B. Your problem, how do we solve it? How are we going to solve it?
M. This I don't know.

B. Do you want me to help you solve it?
M. Yeah.

B. You want me to extend all the help I can possibly give you, don't you?
M. Right.

B. Are you willing to do the same to me?
M. Yeah.

B. Now, I feel . . .
M. Yeah

B. . . . who is ever, whoever is responsible for this act . . .
M. Yeah.

B. He's not a criminal. Does not have a criminal mind. I think they have aproblem.
M. Uh, huh.

B. Do you agree with me?
M. Yeah.

B. They have a problem.
M. Right.

B. A problem, and a good thing about that Frank, is a problem can be rectified.
M. Yeah.

B. I want to help you, I mean I really want to help you, but you know what they say, God helps those who help themselves, Frank.
M. Right.

B. We've got to get together on this. You know what I'm talking about, don't you?
M. Yeah, especially if they're trying to say that, you know, that like you say, I'm identified and my car's identified, and uh, we got to get together on this.

B. Yes we do. Now, that's only a few of the items. . .
M. Uh, huh.

B. . . . that we have now. Your problem, I'm not, let's forget this incident, okay . . .
M. Yeah.

B. . . . let's forget this incident, let's talk about your problem. This is what, this is what I'm concerned with, Frank, your problem.
M. Right.

B. If I had a problem like your problem, I would want you to help me with my problem.
M. Uh, huh.

B. Now, you know what I'm talking about.
M. Yeah.

B. And I know, and I think that, uh, a lot of other people know. You know what I'm talking about. I don't think you're a criminal, Frank.
M. No, but you're trying to make me one.

B. No I'm not, no I'm not, but I want you to talk to me so we can get this thing worked out. This is what I want, this is what I want, Frank. I mean it's all there, it's all there. I'm not saying. . .
M. Let me ask you a question.

B. Sure.
M. Now, you say this girl's dead, right?

B. She died just a few minutes ago. I just got. . . that's what that call was about.
M. Cause Officer Scott said she was in the hospital and I said well then let's go, you know, go right over there.

B. She was in the hospital. . .
M. And, uh . . .

B. . . . the call that Detective Doyle got, that's, that's what that call was.
M. Cause, I told him . . .

B. Are you, do you feel what I feel right now?
M. I feel pretty bad.

B. Do you want to talk to me about it?
M. There's nothing I can tell . . .

B. About how you feel?
M. . . . there's nothing I can talk, I mean I feel sorry for this girl, I mean, uh, this is something that, you know . . .

B. That what?
M. Well, it's a shame, uh . . .

B. What did she say to you?
M. Beg your pardon?

B. What did she say to you?
M. Who?

B. This girl?
M. I never talked to this girl. If she was to walk in here now, I wouldn't know, know that she was the girl that, uh, you're talking about.

B. But you were identified as being there talking to her minutes before she was . . . probably this thing that happened to her. How can you explain that?
M. I can't.

B. Why?
M. I don't know why, but I, I, you know, how can I explain something that I don't know anything about.

B. Frank, look, you want, you want help, don't you Frank?
M. Yes, uh huh, yes, but yet I'm, I'm not going to admit to something that, that I wasn't involved in.

B. We don't want you to, all I want you to do is talk to me, that's all. I'm not talking about admitting to anything, Frank. I want you to talk to me. I want you to tell me what you think. I want you to tell me how you think about this, what you think about this?
M. What I think about it?

B. Yeah.
M. I think whoever did it really needs help.

B. And that's what I think and that's what I know. They don't, they don't need punishment, right? Like you said, they need help.
M. Right.

B. They don't need punishment. They need help, good medical help.
M. That's right.

B. . . . to rectify their problem. Putting them in, in a prison isn't going to solve it, is it?
M. No, sir. I know, I was in there for three and a half years.

B. That's right. That's the, that's not going to solve your problem is it?
M. No, you get no help down there. The only thing you learn is how to, you know. . .

B. Well, let's say this Frank, suppose you were the person who needed help. What would you want somebody to do for you?
M. Help me.

B. In what way?
M. In any way that they, they see, you know, fit, that it would help me.

B. What, what do you think compels somebody to do something like this. What do you think it is, Frank?
M. Well, it could be anumber of things.

B. Give me an example.
M. It could be a person that, that drinks, uh, you know, a lot, and just, you know, don't know what they, what they did once they been drinking. It could be somebody with narcotics that, that don't know what they're, you know, what they're doing once they shot up or took some pills or whatever they do, I don't know, I'm not a drug addict and never intend to be.

B. What else Frank? What other type of person would do something like this?
M. Somebody with a mental problem.

B. Right. Somebody with a . . .
M. Mental problem. . .

B. . . . serious mental problem, and you know what I'm interested in. I'm not, I'm interested in, in preventing this in the future.
M. Right.

B. Now, don't you think it's better if someone knows that he or she has a mental problem to come forward with it and say, look, I've, Ive, I've done these acts, I'm responsible for this, but I want to be helped, I couldn't help myself, I had no control of myself and if I'm examined properly you'll find out that's the case. Is that right or wrong?
M. Yeah, that, they should be examined and, uh, you know, maybe a doctor could find out what's wrong with em.

B. Have you ever been examined?
M. Yes.

B. And did you have a problem?
M. Well, when I come, uh, made parole in, uh, September, the uh stipulation was, uh, that I see a psychiatrist.

B. Alright. . .
M. Dr. Taylor over here at the Medical Canter, I seen him two, maybe three times and last time I was there he gave me a test.. .

B. Uh, huh.
M. . . . uh, it was a bunch of bull shit, in plain English. If the big wheel turns one way, what way doe the little wheel turn? So I took that test. He says, alright, he says, I say when do I come back, because this is part of my parole.

B. I see.
M. And he says, uh, I'll call you and let you know, he says I want to get this , work this test out first. He up to this date, the man has never called me, uh . . .

B. How do you feel about this?
M. Well, I think it's wrong.

B. Would you, do you, did you feel that after not finding out the results of that test that you might do something that you might not be responsible for?
M. No.

B. Did you feel that you were capable, maybe, of doing something because you didn't get the results of this, . . because they didn't like, help you, did they?
M. No.

B. Well, then did you still feel this way that something might happen it would be their fault because, as far as I'm concerned if something did happen, it's not your fault, it's their fault. . .
M. Right.

B. . . . because that was a part of your parole . . .
M. Right.

B. . . . and they didn't live up to it.
M. Right.

B. You agree with me?
M. Yeah, that . . .

B. So, therefore, if you did commit an act, actually they're the ones that are to blame, in my eyes . . .
M. Right.

B. . . . not you as an individual. You were there seeking help. You went there, they didn't, right, you went there voluntarily, right?
M. Right. It was, uh, it was all set up through . . .

B. It was all set up.
M. . . . the parole board, or well, my parole officer, I believe set it up. At that time it was, uh, Gene, uh, DiGennio, I believe his name was.

B. DiGianni.
M. DiGianni.

B. Frank, you're very, very nervous. Now, I, I don't, you know, you, you're, you understand what I'm saying?
M. Yeah, I know what you're saying.

B. Now, there's a reason for that, isn't there?
M. Yes.

B. Do you want to tell me about it?
M. Being involved in something like this is . . .

B. Is what, does it, does it, does it visibly shake you physically?
M. Yes, it does, because, well, Officer Scott can tell you, it ain't been not even a month ago I sat right in the same room . . .

B. Uh, huh.
M. . . . behind the girl that I really loved, because she was a minor her father forced her into making statements, which, she didn't lie on the statements. I tried to cover up with Officer Scott until I heard from her and she said yes, she says, I did tell him, she says, I had to tell him. So, then when I talked to my lawyer, you know, I admitted to him, I admitted to my parole officer, I said I'm not making a liar out of the girl, cause I love her too much and so I admitted, you know, he asked me if we were having sex . . .

B. Alright. What . . .
M. . . . and, uh, I had no intentions of making a liar out of her.

SIDE TWO

B. Testing 1 2 3. Testing.

B. Now listen to me Frank. This hurts me more than it hurts you, because I love people.
M. It can't hurt you anymore than it hurts me.

B. Okay, listen Frank, I want you . . .
M. I mean even being involved in something like this.

B. Okay. listen Frank, If I promise to, you know, do all I can with the psychiatrist and everything, and we get the proper help for you, and get the proper help for you, will you talk to me about it?
M. I can't talk to you about something I'm not . . .

B. Alright, listen Frank, alright, honest. I know, I know what's going on inside you, Frank. I want to help you, you know, between us right now. I know what going on inside you. Frank, you've got to come forward and tell me that you want to help yourself. You've got to talk to me about it. This is the only way we'll be able to work it out. I mean, you know, listen, I want to help you, because you are in my mind, you are not responsible. You are not responsible, Frank. Frank, what's the matter?
M. I feel bad.

B. Frank, listen to me, honest to God, I'm, I'm telling you, Frank, (inaudible). I know, it's going to bother you, Frank, it's going to bother you. It's there, it's not going to go away, it's there. It's right in front of you, Frank. Am I right or wrong?
M. Yeah.

B. You can see it Frank, you can feel it, you can feel it but you are not responsible. This is what I'm trying to tell you, but you've got to come forward and tell me. Don't, don't, don't let it eat you up, don't, don't fight it. You've got to rectify it, Frank. We've got to get together on this thing, or I, I mean really, you need help, you need proper help and you know it, my God, you know, in God's name you, you, you know it. You are not a criminal, you are not a criminal.

M. Alright. Yes, I was over there and I talked to her about the cow and left. I left in my car and I stopped up on the road where, you know, where the cow had been and she followed me in her car . . .

B. Right.
M. . . . and the cow wasn't down there and we started walking through the fields and stuff, and you could see where the cow was.

B. Uh, huh.
M. Now, I don't know . . .

B. Now, Frank please . . .
M. Wait, wait a minute.

B. I'm sorry, I'm sorry.
M. Okay, okay.

B. Go ahead, I'm sorry.
M. I don't know where this guy come from. . .

B. Tell me about him, I'm sorry, go ahead.
M. But. . .

B. Tell me about him Frank. . .
M. Alright, he, alright, he grabbed her. . .

B. Right.
M. . . . that's how I got the cut on my hand, I didn't get cut in the car.

B. Alright, tell me what happened. Tell me what happened. Let it come out, Frank, let it come out. This is what you need, Frank. I'm, it's you and me, now listen.
M. Alright now, he, you know I, tried to get ahold of him and he cut me in the hand with the knife, and he'd already cut her, and then he ran.

B. Alright.
M. So first thing I thought, you know, try and help her. I got her in the car and she just, you know, she just fell over and I got scared because, you know, I thought she was dead.

B. Alright.
M. So, I got down by the bridge, I just, you know, laid her off there and got the hell out of there because I was scared, because, you know. . .

B. Let it come out, Frank. I'm here, I'm here with you now. I'm on your side, I'm on your side, Frank. I'm your brother, you and I are brothers Frank. We are brothers, and I want to help my brother.
M. If I hadn't went down on that road I wouldn't even have been involved in it.

B. Frank, listen. . .
M. It was a shorter way home from, from the Post Office. I'm not lying about that Post Office or nothing. I came out past that cemetery and up that, up that dirt road . . .

B. Alright, let's . . .
M. . . . because I could have, you know, swung off at the Whitehall area, I could have swung off and went through the back way to the house.

B. Let's, Frank, listen. Let's go back to the Post Office, okay? Did you go to the Post Office?
M. Yes.

B. Okay . . .
M. There was one . . .

B. Tell me . . .
M. . . . one woman there, I don't, I don't, I couldn't even begin to describe.

B. Now tell me where you went. Tell me again about this incident, okay?
M. Right.

B. Alright Frank, tell me what happened.
M. I left the Post Office, you want to go from the Post Office, right?

B. Uh, huh.
M. Alright. Alright, then I stuck the letter in the mailbox, the out of town mail, and I left there and I could, went up, was gonna go up the back way because it was a shorter way home. Then I seen this cow along the road and there was a farm there so I figured, you know, it must be their cow. So, I went in there, and I started to get out of the car and the dogs barked so I blew the horn. . .

B. Right.
M. . . . because I wasn't about, I didn't know whether this dog would bite or not. And, I blew the horn two or three times and then this girl come out.

B. Do you remember what the girl looked like? What she was wearing?
M. She was wearing a two piece bathing suit, like you said.

B. Go ahead.
M. I told her there was a cow out there and she said, yeah it's probably one that's always getting out. And I said well do you need a help, you got anybody here to help you get it in and she says, uh, I don't need no help, one says I can get it back myself. So, I went out, went up the road there, out the driveway, she was following me in her car. I think a Corvair, or. So, I stopped up the road there where I, where I had seen the cow and, uh, the cow wasn't there. She pulled up behind me, she got out of the car and I said the cow was here. Well, you can see the marks where the cow had been and we started walking through the, through the field there, uh, it'd be on your lefthand side. And, like I say, I don't know where this guy come from.

B. Tell me what happened.

M. Well, I heard her scream. She, I was walking more or less along the hedgerow there, or trees, whatever you want to call it. I heard her scream and I turned around and I seen a guy there, I'd say he was maybe my height, maybe a little taller, a little smaller, and I don't know, when, when I ran up there he whipped on me, that's how I got this, and . . .

B. Listen Frank, this guy, do you know him? Do you know where he lives?
M. No, I don't know where he lives.

(Inaudible 171 - 173)

B. You killed this girl didn't you?
M. No, I didn't.

B. Honest, Frank? It's got to come out. You can't leave it in. It's hard for you, I realize that, how hard it is, how difficult it is, I realize that, but you've got to help yourself before anybody else can help you. And we're going to see to it that you get the proper help. This is our job, Frank. This is our job. This is what I want to do.
M. By sending me back down there.

B. Wait a second now, don't talk about going back down there. First thing we have to do is let it all come out. Don't fight it because it's worse, Frank, it's worse. It's hurting me because I feel it. I feel it wanting to come out, but it's hurting me, Frank. You're my brother, I mean we're brothers. All men on this, all men on the face of this earth are brothers, Frank, but you got to be completely honest with me.
M. I'm trying to be, but you don't want to believe me.

B. I want to believe you, Frank, but I want you to tell me the truth, Frank, and you know what I'm talking about and I know what you're talking about. You've got to tell me the truth. I can't help you without the truth.
M. I'm telling you the truth. Sure, that's her blood in the car because when I seen the way she was cut I wanted to help her, and then when she fell over I got scared to even be involved in something like this, being on parole and . . .

B. I realize this, Frank, it may have been an accident. Isn't that possible, Frank? Isn't that possible?
M. Sure, it's possible.

B. Well, this is what I'm trying to bring out, Frank. It may be something that, that you did that you can't be held accountable for. This is, I can help you, I can help you once you tell me the truth. You know what I'm talking about. I want to help you, Frank. I like you. You've been honest with me. You've been sincere and I've been the same way with you. Now this is the kind of relationship we have, but I can't help you unless you tell me the complete truth. I'll listen to you. I understand, Frank. You have to believe that, I understand. I understand how you feel. I understand how much it must hurt you inside. I know how you feel because I feel it too. Because some day I may be in the same situation Frank, but you've got to help yourself. Tell me exactly what happened, tell me the truth, Frank, please.
M. I'm trying to tell you the truth.

B. Let me help you. It could have been an accident. You, you've got to tell me the truth, Frank. You know what I'm talking about. I can't help you without the truth. Now you know and I know that's, that's, that's all that counts, Frank. You know and I know that's what counts, that's what it's all about. We can't hide it from each other because we both know, but you've got to be willing to help yourself. You know, I don't think you're a criminal. You have this problem like we talked about before, right?
M. Yeah, you, you say this now, but this thing goes to court and everything and you . . .

B. No, listen to me, Frank, please listen to me. The issue now is what happened. The issue now is truth. Truth is the issue now. You've got to believe this, and the truth prevails in the end, Frank. You have to believe that and I'm sincere when I'm saying it to you. You've got to be truthful with yourself.
M. Yeah, truth, you say in the end, right? That's why I done three and a half years for . . .

B. Wait, whoa. whoa
M. . . . for a crime that I never committed because of one stinkin detective framing me. . .

B. Frank, Frank.
M. . . . by the name of Rocco.

B. Frank, you, you're talking to me now. We have, we have a relationship, don't we? Have I been sincere with you, Frank? . . .
M. Yeah, you . . .

B. . .. Have I been honest?
M. . . . Yes.

B. Have I defined your problem, Frank? Have I been willing to help you? Have I stated I'm willing to help you all I can?
M. Yes.

B. Do I mean it?
M. Yes.

B. Whenever I talk to anybody I talk the same way, because you have a very, very serious problem, and we want to prevent anything in the future. This is what's important, Frank, not what happened in the past. It's right now, we're living now, Frank, we want to help you now. You've got a lot more, a lot more years to live.
M. No, I don't.

B. Yes, you do.
M. No, I don't.

B. Don't say you don't. Now you've got to tell me.
M. Not after all this, because this is going to kill my father.

B. Listen, Frank. There is where you, the truth comes out. Your father will understand. This is what you have to understand, Frank. If the truth is out he will understand. That's the most important thing, not, not what has happened, Frank. The fact that you were truthful, you came forward and you said, look I have a problem. I didn't mean to do what I did. I have aproblem, this is what's important, Frank. This is very important, I got, I, I got to get closer to you, Frank, I got to make you believe this and I'm, and I'm sincere when I tell you this. You got to tell me exactly

what happened, Frank. That's very important. I know how you feel inside, Frank, it's eating you up, am I right? It's eating you up, Frank. You've got to come forward. You've got to do it for yourself, for your family, for your father, this is what's important, the truth, Frank. Just tell me, you didn't mean to kill her did you?
M. I thought she was dead or I'd have never dropped her off like that.

B. Why, Frank? Frank, look at me, okay? I'm lookin at your problem now. Just picture this, okay? I'm lookin at your problem, okay? You follow me?
M. Uhm.

B. What made you do this, please tell me. Please tell me now. What made you do this?
M. I don't know.

B. Alright, explain to me, how, exactly how it happened and then we'll see, maybe we can find out why it happened, alright? Is that fair? Just tell me how it happened and then we'll talk about why it could have happened. This is what's important to me.
M. I don't even know.

B. Well, just tell me what happened, tell me the truth this time. Please, I can't help you without the truth.
M. Like I said I went, I went there because the cow was out . . .

B. I know that and . . .
m. Wait, wait, alright, wait a minute. She followed me out the driveway . We stopped up there on the road. The cow wasn't around and we were talkin. She got in my car. We figured the cow might be down on the other road, or down further.

B. You want it to happen.
M. Yes.

B. Okay. When you got down there, Frank, when you went down there, something happened inside you. This is what I'm interested in, now please tell me, you've got to, you've got to get the proper help, Frank, we want to help you. Please tell me, Frank.
M. I don't know what happened, I really don't.

B. Alright, but tell me, tell me how it happened, the truth this time, Frank.
M. I can't even tell ya that.

B. Well, tell me, tell me Frank, (inaudible) . . . have to be completely truthful with me the way I am with you. It's so important, Frank, honest to God, because people believe truth. I mean, Frank, this is hurting me, God listen. I just want you to come out and tell me, so I can help you, that's all. Listen, it's the right way.
M. I, I swear to God, I don't know what happened down there.

B. Why? Why did you do it?
M. I don't even know that.

B. What did you, what did you cut the girl with? What did you use, Frank?

M. A penknife

B. Your penknife?
M. Yes, sir.

B. Which penknife?
M. The one you have.

B. The one I have?
M. Yes.

B. Where did you cut her, Frank?
M. In the throat.

B. In the throat?
M. Uh, huh.

B. Now, right before you cut her in the throat, what, why did you cut, did, was she fighting you off?
M. No.

B. She wasn't fighting you?
M. No.

B. Why do you think, where were you when you cut her in the throat? Where were you, where were you at, at that moment?
M. Down by the bridge.

B. Down by the bridge?
M. Yes.

B. Were you in the vehicle or were you outside the vehicle?
M. In the car.

B. You were in the car?
M. Yes.

B. Okay, now, you were in the car, right?
M. Uh, huh.

B. Did she get in the car voluntarily?
M. Yes.

B. She did?
M. Yes.

B. Did you ask her to get into the car?
M. Yes.

B. What did you say to her, Frank?
M. I said, why don't we go on down the road and see if the cow's down there.

B. And she got in the car with you?
M. Yes.

B. Where did she get in the car with you?
M. Up o n the main road.

B. Where she parked her car?
M. Yes.

B. Alright. Then you drove down by the bridge.
M. Right.

B. Okay, now. What happened in the car? Where did you have your knife?
M. In my pocket.

B. In your pocket?
M. Yes.

B. And, when did you take it out?
M. From there everything's a blank.

B. Well . . .
M. I didn't, as far as what, you know, what really . . .

B. Alright, well where did you cut her with the knife?
M. In the car.

B. Did she fight you in anyway.
M. No.

B. Did you cut any other part of her body, Frank?
M. No, not that I, no, not that I know of.

B. Did you bite her in anyway, Frank?
M. No, not that I know of.

B. Not that you know of?
M. No.

B. Did she bleed a lot in the car, Frank?
M. Some, yes.

B. What happened to the blood that was in the car, Frank? Did you clean the car, Frank? Did you clean the car out after the blood was in the vehicle?
M. There wasn't really, no, I, I just, you know, wiped what little bit was on the seat.

B. Alright. After you cut her throat, now, what did you do then? After that, after that happened, what did you do then, Frank?
M. I don't know, I, everything just, everything's a blank, really.

B. Well, try and remember now. What, did you get out of the vehicle?
M. I guess. Yeah, I, I got, I got out of the car and I took her out of the car. . .

B. Alright, then what did you do?
M. Carried her over the bridge.

B. Threw her over the bridge?
M. Yes.

B. Did, then, after you threw her over the bridge, then what did you do, Frank?
M. I didn't do, I don't know.

B. Did you drag, did you drag her any further after you threw her over the bridge?
M. I don't think so, no.

B. Try and remember now, it's very important. I'm sure you can understand that, right?
M. Yeah.

B. Try and remember now. You threw her over the bridge . . .
M. Yeah.

B. . . . Now, did you go down and look at her again?
M. I don't really know.

B. Okay. Did you, did you have sexual relations with her, Frank?
M. Not that I know of.

B. Are you sure now? Think hard. Think hard now, while you were in the car?
M. I don't think so.

B. Alright. After she, after you threw her out over the bridge?
M. Yeah.

B. Is that where you had the sexual relations with her?
M. I don't think I did.

B. Did you remove any of her clothing, Frank?
M. I don't believe so, no. I don't really know.

B. Alright. Now think about, did you try and drag her body anywhere?
M. I don't think so.

B. Did you drag the body up towards the water anywhere?
M. I don't think so, no. I say I, I don't know, I . . .

B. Where, once again now, you're in the car with her right?
M. Uh, huh.

B. Now, did you pull the knife out right away? What did you say to her, Frank, before you pulled the knife out? Did you ask her anything?
M. I don't know if I did or not.

B. And you said the pocket knife, what pocketknife were you referring to now, that you used.
M. The one you have.

B. The one that you gave me at PFD Plastics?
M. Yeah.

B. And whereabouts did you cut her?
M. In the throat.

B. In the throat? Is there any reason why you cut her in the throat, Frank?
M. No, not that I know of.

B. Did you, did you caress her breasts in anyway?
M. No.

B. Was she an attractive girl?
M. Um, I'd say so, yes.

B. About what time was that, Frank?
M. I'm not sure.

B. About what time?
M. Well, I was at the Post Office around, I figure 11 o'clock, so it had to be after that.

B. It happened sometime after that, about, about how long?
M. I'd say maybe five after, ten after, something like this. That's about all the time it would take to go from the Post Office to there.

B. And what road were you on when this, when you cut her throat in the vehicle, what road were you on?
M. I don't know the road exactly.

B. Was it a dirt road, Frank?
M. Yes.

B. It was a dirt road?
M. Yes.

B. Did you see anybody at the house when you were there?
M. Just her.

B. Did you see any of her brothers?
M. No.

B. Did you see anyone else?
M. No. No one came out but her.

B. Did you cut any other portion of her body, Frank? Just, just think hard, now, take your time, ah You know, I realize that, you know, that, just take your time and think, did you cut any portion of her body? Did you cut her breasts?
M. No.

B. Are you sure, Frank?
M. Positive.

B. Did you bite her in anyway?
M. I don't think . . .

B. Tell me the truth, Frank. Honest? You've been so honest with me so far, you've been truthful, you've been honest, you've been sincere. Now, after you threw, how did you, which car, which car did you, uh, side of the car did you drag her out of?
M. The driver's side.

B. Driver's side?
M. Yeah.

B. I see. Did you clean your car in anyway?
M. Yeah.

B. Where, where did you clean your car, Frank?
M. I used the hose at home.

B. At home?
M. Yeah, in the driveway.

B. And did you enter your house through the front door, Frank?
M. Through the breezeway.

B. Through the breezeway?
M. Yeah.

B. Where are the rags? What did you use to clean the car out with?
M. I just used the hose.

B. The hose?
M. Yeah.

B. You washed it out?
M. Yes.

B. Where was the vehicle when you washed it out, Frank?
M. In the driveway.

B. In the driveway? Did you use any type of rag on the inside of the car?
M. Just a . . . no.

B. Are you sure, Frank?
M. There was a . . . I had a paper bag, a brown paper bag and then I just wiped some of the water off of the seat and stuff.

B. Where is the brown paper bag now, Frank? What did you do with it?
M. I threw it away.

B. Where did you throw it, Frank?
M. Driving along the road on my way up to Flemington.

B. Where, do you remember on which road you were, or how far you were away from the house when you threw it out the window?
M. No, I don't.

B. You don't have any idea, Frank?
M. No.

B. Now, did you actually throw her over the, uh, the fence there, the rail?
M. Yes.

B. You did?
M. Yes.

B. Did you go, after you threw her over the fence, did you go down and look at her again to see if she was dead?
M. I don't believe I did, no.

B. Was there anyone with you, Frank, when this occurred, or were you alone? You indicated before that you were alone, were you alone with her when this happened?
M. Yeah.

B. I see. Were you driving your car, Frank?
M. Yeah.

B. What kind of car do you drive?
M. a white Mercury.

B. What year is that Mercury?
M. '69.

B. '69? Is there any damage, is there any damage to your vehicle?
M. Yes.

B. Where is the damage?
M. Righthand side.

B. Is your trunk tied down?
M. Yes.

B. Alright. I've indicated before that you would be willing to sit down with me and the Assistant Prosecutor and indicate to him, like you said, that you have a problem.
M. uh, huh.

B. Would you be willing to sit down with us while we take a statement from you?
M. Yes.

B. So it can be incorporated, you follow me?
M. Yeah.

B. In order to help you.
M. Uh, huh.

B. Would you be willing to do that?
M. Uh, huh.

B. Now, is there anything I can get you now? You want coffee?
M. No.

B. You want to just sit here for awhile?
M. Yes.

The time now is 2:45 A.M. Statement concluded at this time.
Statement and interrogation concluded at this time.

APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1275-73

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FRANK MELVIN MILLER, JR.,

Defendant-Appellant.

Argued September 16, 1975 — Decided OCT 27 1975

Before Judges Fritz, Seidman and Milmed.

On appeal from Superior Court of New Jersey, Law Division, Mercer County.

Mr. E. Neal Zimmermann, Designated Attorney, argued the cause for appellant (Mr. Stanley C. Van Ness, Public Defender, attorney).

Mr. Peter N. Gilbreth, Deputy Attorney General, argued the cause for respondent (Mr. William F. Hyland, Attorney General of New Jersey, attorney).

PER CURIAM

Defendant was convicted by a jury of murder in the first degree. He appeals on a number of grounds. The principal one of these is a challenge to the voluntariness of a confession.

We are extraordinarily fortunate in having before us the transcript of a tape recording made during the interrogation which led to the confession. This obviates any need to speculate

with respect to that which transpired. Operating, then, from this unique vantage point, we first declare our allegiance to the "decent" hope that a guilty man may stub his toe. State v. McKnight, 52 N.J. 35, 52 (1968). Then we deplore the techniques and tactics which extracted this confession and which, in our judgment, denied defendant due process of the law.

A Miranda (Miranda v. Arizona, 384 U.S. 436 (1966)) voir dire was held. Thereafter the judge found, in findings adequately supported by credible evidence in the whole record (State v. Johnson, 42 N.J. 146 (1964)), that Miranda warnings were given and in a timely manner. Then the trial judge, recognizing the "only real problem" as being one of "whether or not there was any salolary, inducement, combination thereof that overcame the will of the defendant so that his subsequent answers to the several questions were not, 'voluntary'," and relying upon the definition of "voluntary" found in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), determined the confession to be admissible. He said,

> I don't think there was any trickery either apparent or inferable in this statement. The most that can be said as [defense counsel] has indicated a promise of help. There is no question that is in the statement, but I do not find that promise was such as to cause this confession to be inadmissible and therefore it will be received in evidence subject to certain deletions about which we should talk now I presume.

We are clearly persuaded of error in this determination.

The tape transcript must be read in its entirety for its full aroma to be savored. The interrogation began (at two o'clock in the morning) gently enough with a recitation of an earlier discussion between the interrogating trooper and defendant at the latter's place of work. It prodded (almost kindly; the trooper continually addressed defendant both patronizingly and by his first name) about his whereabouts and activities on the previous day. Then a minor discrepancy in defendant's timetable arose. The trooper pressed his advantage, again gently. "Okay, now," he told defendant, "this is a problem." Defendant said, "I realize this . . ."

Then the trooper pointed out that defendant's vehicle had some damage, some red clay or dirt, and[1]

T: There was blood found on the left front interior portion of your vehicle, tonight, fresh blood.
D: Fresh blood?

T: Yes, sir. This is very, very serious.
D: I realize this.

T: That's point 3. . . .

Then came the first significant police statement, assertedly untrue because as defendant graphically points out in his brief, "no evidence at all of this crucial fact was presented at trial."

[1] In transcript quotations hereafter, "T:" signifies the question or comment from the trooper, and "D:" signifies defendant's response. Emphasis in any of the quotations which follow from the tape transcript is, of course, added.

T: We have a witness, Frank, now this is point 4 — We have a witness who identified your car, who, no, I'm, I'm sorry, let me, I shouldn't say your car, who identified a vehicle that fits the description of your car, at this girl's home, speaking with her, telling her something about a cow being loose. Someone who was there who wanted to help her, they didn't want to hurt this girl, they didn't want to hurt this girl, Frank, they wanted to help her. You see, I know this, I know that, . . .
D: Yeah.

If this was untrue, what followed immediately thereafter was obviously designed to capitalize on the chicane:

T: . . . because I can appreciate that, because I would have done the same thing. If there was something to be rectified, or if somebody had a problem, I would have done the same thing. I would have wanted to help her. The vehicle that came onto the property . . .
D: Right.

T: . . . fits the description of your vehicle.
D: It does.

T: Yes. Now, that's the fourth point. And when I say fits the description, what I mean, Frank, is it fits the description to a 't', and as we talked about before, how many other vehicles are there like yours in the County right now?

D: There shouldn't be too many, if any. . .

T: If any. .
D: . . . because of the damage on the right-hand side.

T: Now, what would your conclusion be under those circumstances, if someone told you that?
D: I'd probably, uh, have the same conclusion you got.

T: Which is what?
D: That I'm the guy that, that did this.

T: That did what?
D: Committed this crime.

The trooper then told defendant that "we have a physical description * * * from another witness" which "fits you and the clothes you were wearing." Defendant also challenges the truthfulness of this statement. In any event, that which had proceeded provided all the stage that was needed for that which followed. The trooper embarked doggedly on a campaign marked by (1) his insistence that defendant was not a criminal and did not have a criminal mind and (2) persistent offers "to help." Typical of that which was to occupy a good portion of the balance of this fifty-eight minute grilling was what then transpired:

T: Frank, I don't think you're a criminal. I don't think you're a criminal. I don't think you have a criminal mind. As a matter of fact, I know you don't have a criminal mind, because we've been talking now for a few hours together, haven't we?
D: Right.
T: Right?
D: Yeah.
T: You don't have a criminal mind.
D: No.
T: I know you don't. But, like I noted before, we all have problems.
D: Right.
T: Am I right?
D: Yeah, you said this over there at the plant.
T: And you agree with me?
D: Yes, sir.

T: I have problems and you have.
D: Right.
T: Now, how do you solve a problem?
D: That depends on the problem.
T: Your problem, how do we solve it? How are we going to solve it?
D: This I don't know.
T: Do you want me to help you solve it?
D: Yeah.
T: You want me to extend all the help I can possibly give you, don't you?
D: Right.
T: Are you willing to do the same to me?
D: Yeah.
T: Now, I feel . . .
D: Yeah.
T: . . . who is ever, whoever is responsible for this act . . .
D: Yeah.
T: He's not a criminal. Does not have a criminal mind. I think they have a problem.
D: Uh, huh.
T: Do you agree with me?
D: Yeah.
T: They have a problem.
D: Right.
T: A problem, and a good thing about that Frank, is a problem can be rectified.
D: Yeah.
T: I want to help you, I mean I really want to help you, but you know what they say, God helps those who help themselves, Frank.
D: Right.
T: We've got to get together on this. You know what I'm talking about, don't you?
D: Yeah, especially if they're trying to say that, you know, that like you say, I'm identified and my car's identified, and uh, we got to get together on this.

T: Yes we do. Now, that's only a few of the items. . .
D: Uh, huh.

T: . . . that we have now. Your problem, I'm not, let's forget this incident, okay . . .
D: Yeah.

T: . . . let's forget this incident, let's talk about your problem. This is what, this is what I'm concerned with, Frank, your problem.
D: Right.

T: If I had a problem like your problem, I would want you to help me with my problem.
D: Uh, huh.

T: Now, you know what I'm talking about.
D: Yeah.

T: And I know, and I think that, uh, a lot of other people know. You know what I'm talking about. I don't think you're a criminal, Frank.
D: No, but you're trying to make me one.

T: No I'm not, no I'm not, but I want you to talk to me so we can get this thing worked out. This is what I want, this is what I want, Frank. I mean it's all there, it's all there. I'm not saying. . .

The will-abrading grind continued:

D: If she [the victim] was to walk in here now, I wouldn't know, know that she was the girl that, uh, you're talking about.

T: But you were identified as being there talking to her minutes before she was . . . probably this thing that happened to her. How can you explain that?
D: I can't.

T: Why?
D: I don't know why, but I, I, you know, how can I explain something that I don't know anything about.

T: Frank, look, you want, you want help, don't you Frank?
D: Yes, uh huh, yes, but yet I'm, I'm not going to admit to something that, that I wasn't involved in.

T: We don't want you to, all I want you to do is talk to me, that's all. I'm not talking about admitting to anything Frank. I want you to talk to me. I want you to tell me what you think. I want you to tell me how you think about this, what you think about this?
D: What I think about it?

T: Yeah.
D: I think whoever did it really needs help.

T: And that's what I think and that's what I know. They don't, they don't need punishment, right? Like you said, they need help.
D: Right.

T: They don't need punishment. They need help, good medical help.
D: That's right.

T: . . . to rectify their problem. Putting them in, in a prison isn't going to solve it, is it?
D: No, sir. I know, I was in there for three and a half years.

T: That's right. That's the, that's not going to solve your problem is it?
D: No, you get no help down there. The only thing you learn is how to, you know. . .

T: Well, let's say this Frank, suppose you were the person who needed help. What would you want somebody to do for you?
D: Help me.

T: In what way?
D: In any way that they, they see, you know, fit, that it would help me.

The trooper induced defendant to say that whoever committed the deed probably had a mental problem. Then he asked defendant if he had ever been "examined." Upon being advised that he had been tested, the trooper then directed his energies to convincing defendant that he "might not be responsible for" his acts but that the blame was in others for their inability to help him.

T: Well, then did you still feel this way that something might happen it would be their fault because, as far as I'm concerned if something did happen, it's not your fault, it's their fault. . .
D: Right.

The trooper acknowledged that defendant was becoming "very, very nervous." The time had come.

T: Now listen to me Frank. This hurts me more than it hurts you, because I love people.
D: It can't hurt you anymore than it hurts me.

T: Okay, listen Frank, I want you . . .
D: I mean even being involved in something like this.

T: Okay, listen Frank. If I promise to, you know, do all I can with the psychiatrist and everything, and we got the proper help for you, and got the proper help for you, will you talk to me about it?
D: I can't talk to you about something I'm not . . .

T: Alright, listen Frank, alright, honest. I know, I know what's going on inside you, Frank. I want to help you, you know, between us right now. I know what going on inside you. Frank, you've got to come forward and tell me that you want to help yourself. You've got to talk to

me about it. This is the only way we'll be able to work it out. I mean, you know, listen, I want to help you, because you are in my mind, you are not responsible. You are not responsible, Frank. Frank, what's the matter?
D: I feel bad.

T: Frank, listen to me, honest to God, I'm, I'm telling you, Frank, (inaudible). I know, it's going to bother you, Frank, it's going to bother you. It's there, it's not going to go away, it's there. It's right in front of you, Frank. Am I right or wrong?
D: Yeah.

T: You can see it Frank, you can feel it, you can feel it but you are not responsible. This is what I'm trying to tell you, but you've got to come forward and tell me. Don't, don't, don't let it eat you up, don't, don't fight it. You've got to rectify it, Frank. We've got to get together on this thing, or I, I mean really, you need help, you need proper help and you know it, my God, you know, in God's name you, you, you know it. You are not a criminal, you are not a criminal.

That was enough. Defendant had been told in the name of God he was not a criminal.

D: Alright. Yes, I was over there and I talked to her about the cow and left. I left in my car and I stopped up on the road where, you know, where the cow had been and she followed me in her car . . .

Even the recitation of the details was interrupted with relentless and successful Svengalian efforts. At one point the trooper interjected, "Let it come out, Frank. I'm here, I'm here

with you now. I'm on your side, I'm on your side, Frank. I'm your brother, you and I are brothers Frank. We are brothers, and I want to help my brother."

Defendant's continued insistence that despite his presence at the scene, he was not the killer could not long resist the tremendous psychological pressure.

T: You killed this girl didn't you?
D: No, I didn't.

T: Honest, Frank? It's got to come out. You can't leave it in. It's hard for you, I realize that, how hard it is, how difficult it is, I realize that, but you've got to help yourself before anybody else can help you. And we're going to see to it that you get the proper help. This is our job, Frank. This is our job. This is what I want to do.
D: By sending me back down there.

T: Wait a second now, don't talk about going back down there. First thing we have to do is let it all come out. Don't fight it because it's worse, Frank, it's worse. It's hurting me because I feel it. I feel it wanting to come out, but it's hurting me, Frank. You're my brother, I mean we're brothers. All men on this, all men on the face of this earth are brothers, Frank, but you got to be completely honest with me.
D: I'm trying to be, but you don't want to believe me.

T: I want to believe you, Frank, but I want you to tell me the truth, Frank, and you know what I'm talking about and I know what you're talking about. You've got to tell me the truth. I can't help you without the truth.
D: I'm telling you the truth. Sure, that's her blood in the car because when I seen the way she was cut I wanted to help her, and then when she fell over I got scared to even be involved in something like this, being on parole and . . .

T: I realize this, Frank, it may have been an accident. Isn't that possible, Frank? Isn't that possible?
D: Sure, it's possible.

T: Well, this is what I'm trying to bring out, Frank. It may be something that, that you did that you can't be held accountable for. This is, I can help you, I can help you once you tell me the truth. You know what I'm talking about. I want to help you, Frank. I like you. You've been honest with me. You've been sincere and I've been the same way with you. Now this is the kind of relationship we have, but I can't help you unless you tell me the complete truth. I'll listen to you. I understand, Frank. You have to believe that, I understand. I understand how you feel. I understand how much it must hurt you inside. I know how you feel because I feel it too. Because some day I may be in the same situation Frank, but you've got to help yourself. Tell me exactly what happened, tell me the truth, Frank, please.
D: I'm trying to tell you the truth.

T: Let me help you. It could have been an accident. You, you've got to tell me the truth, Frank. You know what I'm talking about. I can't help you without the truth. Now you know and I know that's, that's, that's all that counts, Frank. You know and I know that's what counts, that's what it's all about. We can't hide it from each other because we both know, but you've got to be willing to help yourself. You know, I don't think you're a criminal. You have this problem like we talked about before, right?
D: Yeah, you, you say this now, but this thing goes to court and everything and you . . .

T: No, listen to me, Frank, please listen to me. The issue now is what happened. The issue now is truth. Truth is the issue now. You've got to believe this, and the truth prevails in the end, Frank. You have to believe that and I'm sincere when I'm saying it to you. You've got to be truthful with yourself.
D: Yeah, truth, you say in the end, right?

That's why I done three and a half years for . . .

T: Wait, whoa. . . whoa
D: . . . for a crime that I never committed because of one stinkin detective framing me. . .
T: Frank, Frank.
D: . . . by the name of Rocco.
T: Frank, you, you're talking to me now. We have, we have a relationship, don't we? Have I been sincere with you, Frank? . . .
D: Yeah, you . . .
T: . .. Have I been honest?
D: . . . Yes.

T: Have I defined your problem, Frank? Have I been willing to help you? Have I stated I'm willing to help you all I can?
D: Yes.
T: Do I mean it?
D: Yes.

T: Whenever I talk to anybody I talk the same way, because you have a very, very serious problem, and we want to prevent anything in the future. This is what's important, Frank, not what happened in the past. It's right now, we're living now, Frank, we want to help you now. You've got a lot more, a lot more years to live.
D: No, I don't.
T: Yes, you do.
D: No, I don't.
T: Don't say you don't. Now you've got to tell me.
D: Not after all this, because this is going to kill my father.

T: Listen, Frank. There is where you, the truth comes out. Your father will understand. This is what you have to understand, Frank. If the truth is out he will understand. That's the most important thing, not, not what has happened, Frank. The fact that you were truthful, you came forward and you said, look I have a problem. I didn't mean to do what I did. I have a problem, this is what's important, Frank.

This is very important, I got, I, I got to get closer to you, Frank, I got to make you believe this and I'm, and I'm sincere when I tell you this. You got to tell me exactly what happened, Frank. That's very important. I know how you feel inside, Frank, it's eating you up, am I right? It's eating you up, Frank. You've got to come forward. You've got to do it for yourself, for your family, for your father, this is what's important, the truth, Frank. Just tell me, you didn't mean to kill her did you?

Defendant's capitulation to the superior mind was complete:

D: I thought she was dead or I'd have never dropped her off like that.

"I mean, Frank," the trooper said, "this is hurting me, God listen. I just want you to come out and tell me, so I can help you, that's all."

At the end of the interrogation and before a written statement could be prepared, Frank Miller collapsed physically. In his testimony the trooper candidly described it as "a state of shock. * * * Mr. Miller had been sitting on a chair, had slid off of the chair on to the floor maintaining a blank stare on his face, staring straight ahead and we were unable to get any type of verbal response from him at that time."

A first aid squad was contacted. Defendant was taken to a hospital.

Our concern for the treatment of defendant and the patent denial of due process is substantially tempered by our conviction of defendant's guilt. We now agonize over the necessity for giving an edge to one whom the police authorities reasonably, and very probably correctly, believed to be guilty of a most heinous crime, involving the greatest of all criminal wrongs, murder. But we have no doubt at all of our duty. An overbearing broadside which results in a confession by virtue of intense and mind bending psychological compulsion deserves no better fate at our hands than does the legendary rubber hose. Chambers v. Florida, 309 U.S. 227 (1940). We have long cherished a determination that the fair winds of due process shall blow upon the guilty as well as the innocent. We will not here let our gratitude for good police work which ferreted out one who is most probably a murderer, and our abhorrence at the crime he committed, cause us to abandon basic constitutional principles.

Thus, in the circumstances here, defendant's confession was involuntary in the constitutional sense and is inadmissible. The error in its admission requires a reversal and a new trial.

Broadly based as is our conclusion of law, we need not further wrestle with subordinate problems related to defendant's claims that the confession was the product of express promises of psychiatric help, such as that there were "strongly implied"

promises of an insanity defense and no prison sentence, that the police lied to defendant in order to obtain the confession and so forth. Our determination also makes it unnecessary for us to decide many other issues raised on the appeal.

For guidance of the court below on the retrial, however, we report that on the record before us we do not agree with defendant that the evidence relating to the events and colloquy at the plastics factory should have been excluded because of the absence of Miranda warnings.

We also acknowledge (only so it may not be thought to have been overlooked) defendant's complaint with respect to the refusal of the trial judge to charge manslaughter. We will not here speculate with respect to the nature of the testimony and evidence which will be adduced at the new trial. Any request to charge properly brought should, of course, be considered, as we are certain it will be. It is axiomatic that whether any requested charge should be given depends on the facts concerning which there is an issue.

Defendant personally filed a pro se brief. In it he launches still another attack on the "key man" jury selection system and on the allegedly discriminatory nature of jury selection in his case. Beyond the lack of support anywhere in the record for the claim of discriminatory jury selection, the arguments are frivolous. The challenge to the jurors' oath and that which alleges grand jury misconduct is equally frivolous and sham. Finally, defendant claims his counsel was inadequate and

ineffective, particularly prior to trial. The argument is without merit.

Reversed and remanded for a new trial.

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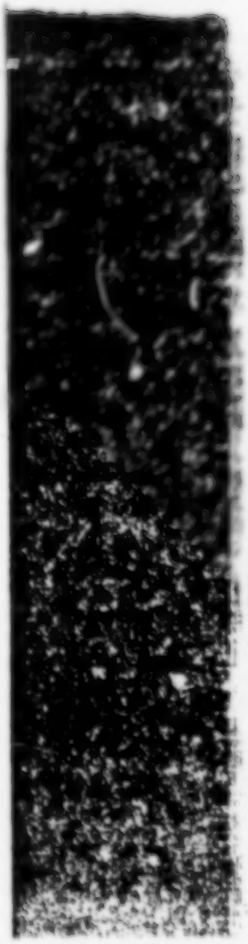

torney General, of counsel; *Ms. Espinosa* and *Mr. Gilbreth* on the briefs; *Mr. John J. Degnan*, Attorney General of New Jersey, attorney).

Mr. E. Neal Zimmermann, Designated Counsel, argued the cause for respondent (*Mr. Stanley C. Van Ness*, Public Defender, attorney).

The opinion of the court was delivered by

SULLIVAN, J. Defendant was indicted for the murder of Deborah S. Margolin, a 17-year old girl, was tried by jury and found guilty of murder in the first degree. He was sentenced to life imprisonment in State Prison. The principal evidence against him was his oral statement, recorded on tape, made while he was being questioned at police barracks, in which he admitted killing the girl. On appeal, the Appellate Division, in an unreported opinion, reversed the conviction on the ground that defendant's confession was involuntary in the constitutional sense. This Court granted certification of the State's petition. 76 *N. J.* 141 (1978).

The essential facts are as follows. On the morning of August 13, 1973, Deborah Margolin, 17 years of age, was sunbathing on the patio of her parents' farmhouse in East Amwell Township, Hunterdon County. She was wearing a two-piece bathing suit at the time. While she was there a white car drove up to the house and the driver sounded the car's horn several times. The girl's brothers, Daniel and Bernard, from upstairs windows in the house, observed a dusty white vehicle with two severe dents in its right side and its trunk tied shut. The male driver wore business clothes and "looked like a factory worker." Daniel heard the man tell Deborah that a heifer was loose down at the bottom of the driveway. The girl told her brother that she didn't need any help, got into a family car and drove down the driveway. She was never seen alive again.

Later that afternoon when the girl failed to return home, a search of the area was made and Deborah's body was found face down in a stream. Her throat had been slashed, severing her windpipe and jugular vein. The girl was nude except for a part of her bathing suit around her waist. Stab and cutting wounds had been inflicted in her pelvic area and vagina. Her right breast had been cut.

The description of the car in the driveway given to the police directed immediate attention to defendant who was then on parole from a 1969 conviction of carnal abuse and who had been arrested on July 10, 1973 on another morals charge. The arresting officer in that case, who was also participating in the investigation of the Deborah Margolin homicide, noted that the description of the car seen in the Margolin driveway was similar to the one owned by defendant. Miller's appearance also conformed with the description of the driver of that car given by one of the brothers.

Two police officers located defendant at approximately 10:30 p.m. that same day and interviewed him at a plastics factory in Flemington where he was employed. After some conversation during which defendant gave the officers permission to examine his car which was parked there, defendant agreed to accompany the officers to the Flemington police barracks for further questioning. They arrived at the barracks at about 11:40 p.m. The questioning began about two hours later and lasted for about 55 minutes. The interview was tape recorded.

Defendant initially was read his *Miranda* rights and expressed his willingness to talk without an attorney being present. However, he asked for and was given reassurance of his right to stop at any time and remain silent. Defendant then signed and dated a *Miranda* rights card. In the beginning defendant denied any involvement in the episode at the Margolin farmhouse and the girl's subsequent death. However, he was confronted with time discrepancies in his story as to his whereabouts at the time. The officer pointed out that the description of the vehicle seen in the Margolin drive-

He found the questioning not to have been improper or coercive and that defendant's statement was voluntary and admissible. At the conclusion of the State's case, defendant elected not to take the stand and testify in his own defense.

During the trial an incident took place which defendant claimed also prejudiced his right to a fair trial. Because of the nature of the crime, 16 persons were chosen to hear the case pursuant to *R.* 1:8-2(d). The rule is intended to insure a sufficient number of jurors to render a verdict should a juror die or become ill, disabled or otherwise disqualified from continuing to act. The rule is particularly useful in a protracted trial where the loss of a juror would otherwise require a mistrial. The rule then provided as follows:[1]

> (d) Alternate Jurors; Civil and Criminal Actions. The court in its discretion may direct the impanelling of a jury of such number as is appropriate under the circumstances not to exceed 16, having the same qualifications and impanelled and sworn in the same manner as a jury of 12. If a juror is excused after he has been sworn but before any opening statement is begun, another juror may be impanelled and sworn to take his place. All the jurors shall sit and hear the case, but the court for good cause shown may excuse any of them from service provided the number of jurors is not reduced to less than 12 or 6 as the case may be or such other number as may be stipulated to. If more than such number are left on the jury at the conclusion of the court's charge, the clerk of the court in the presence shall put their names on slips folded to conceal the names, shall place the slips in a suitable box and from it shall draw such number of names as will reduce the jury to the number required to determine the issues. Following the drawing of the names of jurors to determine the issues, the court may in its discretion order that the alternate jurors not be discharged, in which event the alternate jurors shall be sequestered apart from the other jurors and shall be subject to the same orders and instructions of the court, with respect to sequestration and other matters, as the other jurors. If the alternate jurors are not discharged and if at any time after submission of the case to the jury, a juror dies or a juror is discharged by the court because he is ill or otherwise unable to continue, the court may direct the clerk to draw the name of an alternate juror to take the place of the juror who is deceased or discharged. When such a substitution of an alternate juror is made, the court shall give the jury such supplemental instructions as may be appropriate.

In the instant case, at the conclusion of the trial, the names of 12 of the 16 jurors were drawn to constitute the jury.[2] However, the court did not discharge the remaining four jurors. Pursuant to the rule, it directed that they be sequestered apart from the other jurors to be available if needed to replace one of the 12 jurors chosen.

After the jury had been deliberating for about an hour and a quarter, it sent a note asking the court "to clarify the definition between first and second degree murder." The jury was recalled and recharged on the distinction between the two degrees of murder, the court to a large extent repeating verbatim the language of its original charge.

Just after the court finished its supplemental instructions and asked the jury to retire to continue its deliberations, and before the jury left the jury box, juror number 11 asked to be dismissed from the jury as he was too nervous and that it was affecting his judgment. In answer to an inquiry by the court the juror said that he did not think he could render a fair verdict.

At the sidebar conference, the prosecutor suggested that the juror be excused and one of the alternate jurors be chosen to take his place. Counsel for defendant stated that he could "hardly object to the withdrawal of a juror who says he can't reach a fair and impartial verdict." However, he opposed substituting a juror after the jury had retired to deliberate. He said that the only remedy was to declare a mistrial.

The court discharged juror number 11 from the panel and had the clerk, he had, draw the name of one of the alternate jurors to take the place of the juror who is deceased or discharged. When such a substitution of an alternate juror is made, the court shall give the jury such supplemental instructions as may be appropriate.

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[1] Effective September 6, 1977 the rule was amended to eliminate the phrase "not to exceed 16" in the fourth line of the rule.

[2] Under the rule, the proper procedure should have been to reduce the number of jurors to 12 by selecting 4 alternates. No prejudice resulted from this procedural error.

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way matched defendant's car to a "T" and that the inspection of defendant's car in the parking lot of the plastics factory disclosed fresh blood in the front seat. The officer said that the description of the driver of the car fitted defendant and the clothes he was wearing. Despite this, defendant continued to insist that he never talked to the girl and that he was not going to admit to something that he "wasn't involved in."

The conversation then got around to the subject of the mental condition of the person who had committed the crime. Defendant said that "whoever did it really needs help." The officer suggested that such a person was not really a criminal who should be punished, but rather needed medical treatment. The officer said he would do all he could to help defendant but that defendant had to help himself first by talking about it.

Finally, the defendant admitted that he was the person who drove up the Margolin driveway and spoke to the girl about the car. He said that he had driven back to where he had seen the car, with the girl following him in her car. They started walking through the fields when, according to defendant, he heard the girl scream, he turned and saw a man with a knife cutting the girl. Defendant said he tried to help the girl but the man cut him with the knife and ran away. Defendant put the girl in his car but panicked because he thought she was dead and when he got to a bridge over a stream he "dropped her off" the bridge into the stream.

The officer said that defendant was not being completely honest with him stating "you killed this girl didn't you?" When defendant answered "No I didn't" the officer repeated, "You've got to tell me the truth. I can't help you without the truth." Defendant's reply was

> I'm telling you the truth. Sure, that's her blood in the car because when I seen the man she was cut I wanted to help her, and then when she fell over I got scared to even be involved in something like this, being on parole.

The officer persisted that truth was the issue, and truth would prevail in the end. He urged defendant "to be truthful with yourself." Defendant began to waver in his denial, saying, "This is going to kill me father." Seizing on the reference to his father, the officer said

> [I]f the truth is out, he will understand. That's the most important thing, not what has happened, Frank. The fact that you were truthful, you came forward and you said, look I have a problem. I didn't mean to do what I did. I have a problem. This is what's important, Frank.

Defendant then confessed. He said that when they were unable to find the cop, the girl got into his car to go down the road to see if the cop was there. They drove down by the bridge where defendant took a penknife from his pocket and started cutting the girl. Defendant said he had no real recollection of just what he did to the girl or why, although he was allowed throwing her body off the bridge. After the incident defendant said he drove home and, using a hose, washed the blood from the seat of the car. In answer to the officer's inquiry, defendant indicated he would be willing to give a formal statement.

Shortly after the questioning was terminated, defendant appeared to go into a state of shock. He slid off the chair onto the floor and had a blank stare on his face. When he did not respond to questions, he was taken to the Hunterdon Medical Center.

The tape recording was the principal evidence against defendant at his trial. It was admitted into evidence over defendant's objection and following a *voir dire* hearing at which defendant testified that he remembered going to the barracks for questioning but had no recollection of his intervention, as recorded on the tape. According to defendant, the first thing he remembered after being in the barracks' coffee room was when he came to in the medical center.

The trial judge attached no particular significance to defendant's lack of present recollection of the taped interview.

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a criminal who should be punished, but a person who needs medical treatment. Does the officer have the right to tell the suspect that he must help himself first by telling the truth and then the officer will do what he can to help the suspect with his problem?

It must be conceded that this technique moves into a shadowy area and if carried to excess in time and persistence, can cross that intangible line and become improper. If though, the questioning lasted for just less than an hour. While there is an indication that defendant was becoming distressed near the end, this would be a normal reaction as the enormity of what defendant had done was being brought home to him. Defendant had expressed the fear that "this is going to kill my father." Defendant's collapse shortly after completion of his interrogation was the culmination of this realization.

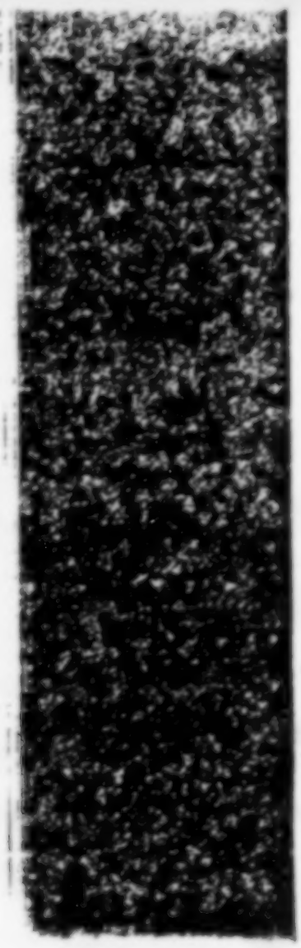
[4] It is evident from the record in this case that the officer's remarks had no appreciable impact on defendant and certainly did not contribute to an "overbearing of his will." Defendant, as previously noted, had been arrested on previous occasions and had a prior conviction for which he had been imprisoned. He was in no way deluded or misled into believing that the state trooper was acting in any capacity other than as an interrogating police officer in the investigation of a serious crime. Miller was fully aware that a murder had been committed which was the subject of the investigation and that he was a prime suspect in the killing. He well knew that should the investigation prove successful and were he to confess he would be charged with the commission of the crime. He was certainly cognizant of the fact that he would be handled through the criminal judicial system and, if found guilty, he would be punished accordingly. There is no basis for concluding that Miller did not have this complete understanding of his situation throughout his interrogation and confession.

[5-8] Before it can be admitted into evidence and submitted to a jury, a defendant's confession must be proven

by the State to be voluntary beyond a reasonable doubt. *State v. Kelly*, 61 *N. J.* 283, 294 (1972). A confession which is the product of physical or psychological coercion must be considered to be involuntary and inadmissible in evidence regardless of its truth or falsity. However, we disagree with the Appellate Division's suggestion that the use of a psychologically-oriented technique in questioning a suspect is inherently coercive. Questioning of a suspect almost necessarily involves the use of psychological factors. Appealing to a person's sense of decency and urging him to tell the truth for his own sake are applications of psychological principles. Use of a psychiatrically-oriented technique is not improper merely because it causes a suspect to change his mind and confess. The test issue is whether the change of mind was voluntary and not an overbearing of the suspect's will.

[9, 10] We find that the interrogation in this case did not exceed proper bounds and that the voluntariness of defendant's confession could properly have been determined by the trial court to be established beyond a reasonable doubt. It was, therefore, properly admitted into evidence. In this connection, we reject defendant's related contentions that his confession was the product of strongly implied promises of an insanity defense and no prison sentence if defendant confessed or having no substantial basis in the record. The same for the contention that the confession was the product of trickery and lies by the police.

We next consider defendant's argument that *R.* 1:8-2(d) is unconstitutional insofar as it permits an alternate juror to be substituted for an original juror after jury deliberations have begun. The contention is that substitution of a juror at this stage of the proceeding infringes on a defendant's right to trial by jury. We considered this question in 1972 when the particular amendment to the rule was proposed. Our adoption of the amendment, effective September 5, 1972, was based on the conclusion that no constitutional obstacle was presented.



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ternate jurors to take the place of the discharged juror. The court then told the jury that it would have to "start over" in its deliberations. About 40 minutes later the jury reported that it had agreed on a verdict. In open court it then returned a verdict finding defendant guilty of murder in the first degree.

The Appellate Division reversed the conviction on the grounds that defendant's confession was the result of intense and mind-bending psychological compulsion and should have been excluded from evidence as involuntary in the constitutional sense. The Appellate Division expressed its "conviction of defendant's guilt" and its "abhorrence at the crime he committed." Nevertheless, it held that the guilty as well as the innocent were entitled to due process and that the use of defendant's confession at his trial required a reversal and a new trial.

We have no quarrel with the legal principles expressed by the Appellate Division. We disagree, though, with its evaluation of the techniques and tactics used by the officer who questioned defendant, as well as its conclusion that defendant's confession was involuntary in the constitutional sense.

[1] Every case must turn on its particular facts. In determining the issue of voluntariness, and whether a suspect's will has been overborne, a court should assess the totality of all the surrounding circumstances. It should consider the characteristics of the suspect and the details of the interrogation. Some of the relevant factors include the suspect's age, education and intelligence, advice as to constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature and whether physical punishment or mental exhaustion was involved. *Schneckloth v. Bustamonte*, 412 *U. S.* 218, 226, 93 *S. Ct.* 2041, 2047, 36 *L. Ed.* 2d 854, 862 (1973). A suspect's previous encounters with the law has been mentioned as an additional relevant factor. *State v. Pucbaldi*, 48 *N. J.* 97, 101 (1965).

Here defendant was a mature man 37 years of age, with some high school education, who had previous experiences with the law. In its finding of voluntariness the trial court emphasized that defendant was "quite familiar" with his *Miranda* rights. There was no indication of low grade or subnormal intelligence on defendant's part. He was oriented, alert and responsive.

[2] The tape recording shows that defendant was advised of his *Miranda* rights and had expressed his willingness to talk to the officer without having an attorney present but first sought and obtained reassurance that he could stop at any time and remain silent. The officer then proceeded to prod defendant about time discrepancies in his story as to his whereabouts at the time the girl left her house. He was reminded of evidence that linked him and his car to the incident. As the trial court noted, an interrogating police officer is not limited to asking a suspect if he committed the crime and if he receives a negative answer, that must be the end of the questioning.

[3] There is a natural reluctance on the part of a suspect to admit to the commission of a crime and furnish details. *See State v. Smith*, 32 *N. J.* 501, 550 (1960), *cert.* denied, 364 *U. S.* 936, 81 *S. Ct.* 383, 5 *L. Ed.* 2d 367 (1961). Efforts by an interrogating officer to dissipate this reluctance and persuade the person to talk are proper so long as the will of the suspect is not overborne. As we said in *Smith*, *supra*, 32 *N. J.* at 550,

> An interrogation, no matter how constitutionally conducted, is naturally bound to be a tense occasion and to evoke apprehension, nervousness and a sense of pressure, no matter what the situation, which will be heightened in a person who knows he is guilty by consciousness of guilt and fear of the legal penalty. It must be recognized that it is not this kind of normal stress, fear and pressure which can make the questioning unfair and a confession involuntary.

The inquiry is whether an interrogating officer can appeal to a suspect by telling him that he is the suspect's friend and wants to help him — that whoever killed this girl is not

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selection of the jury, they are to be sequestered apart from the other jurors but are subject "to the same orders and instructions of the court, * * * as the other jurors."

[15] However, we conclude that defendant was not prejudiced by the failure to comply with the rule. The original charge to the entire jury panel including the alternate jurors was an adequate and correct instruction as to the difference between the two degrees of murder. The supplemental charge, to a great extent, repeated, almost verbatim, the original instructions. The entire jury was told that if it needed clarification of any part of the court's charge, it should submit a written request to the court. After the alternate juror was seated no request for clarification was made so that it must be assumed that this juror did not need further instructions. In the circumstances, we find no reversible error.

[16] We have considered defendant's additional contention that there should have been a charge on manslaughter. The point is frivolous. There is nothing in the record to support the submission of such an issue to the jury. *See State v. Artis*, 57 *N. J.* 24, 30 (1970).

The judgment of the Appellate Division is reversed and the judgment of conviction, including the sentence imposed, is hereby reinstated.

For reversal, P. J. A. D. (temporarily assigned), dissenting. I am constrained to dissent from the Court's reversal of the Appellate Division judgment in this case. My grounds are two: (1) the unanimous determination of the Appellate Division that the confession obtained from defendant was extracted from him by means that denied him due process was sound; and (2) the circumstances attending the substitution of a juror during the deliberations of the jury denied the defendant his right to an untainted jury trial. For either or both of these reasons the verdict of guilt should be set aside and the defendant granted a new trial.

I

I address the confession issue first. It goes without saying that it is not easy for a judge to render an adjudication that results in the vacation of the conviction of an apparently guilty person — especially where the crime is as reprehensible as this one. It is evident from the Appellate Division opinion that that court felt the pressure of the same considerations. But no principle of legal jurisprudence is better settled in this country or more self-evident than that the price of faithful enforcement by the judiciary of the constitutional rights of individuals embedded in the Bill of Rights may on occasion be the setting free or the enforced retrial of a malefactor. Only a year ago Justice Stewart, in a case comparable to the instant one in its tension between the demands of law enforcement and those of vindication of individual constitutional rights, felt moved to say, in expressing the reasons of the Supreme Court for vacating a conviction:

> The premises on state corrective and judicial officers charged with the administration of the criminal law are great, especially when the crime is murder and the victim a small child. But it is precisely the predictability of these pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all.
>
> *Brewer v. Williams*, 430 *U. S.* 387, 404, 97 *S. Ct.* 1232, 1240, 51 *L. Ed.* 2d 424 (1977).

Previously, in a confession case, Chief Justice Warren had said:

> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.
>
> *Spano v. New York*, 360 *U. S.* 315, 320-321, 79 *S. Ct.* 1202, 1206, 3 *L. Ed.* 2d 1265 (1959). *See also Mapp v. Ohio*, 367 *U. S.* 643, 659, 81 *S. Ct.* 1684, 6 *L. Ed.* 2d 1081

Nevertheless, the matter is not completely free from question. In *People v. Ryan*, 19 *N. Y.* 2d 100, 278 *N. Y. S.* 2d 199, 224 *N. E.* 2d 710 (Ct. App. 1966) the New York Court of Appeals struck down a similar provision in the New York *Code of Criminal Procedure* as violative of the right of trial by jury provided by the New York Constitution. The court held that substituting a juror after deliberations had begun was in effect bringing a 13th juror into the deliberations and that it offended the constitutional provision.

At the opposite pole is *People v. Collins*, 17 *Cal.* 2d 687, 131 *Cal. Rptr.* 797, 552 *P.* 2d 749 (Sup. Ct. 1976), *cert. denied*, 429 *U. S.* 1077, 97 *S. Ct.* 820, 50 *L. Ed.* 2d 796 (1977), where the Supreme Court of California upheld a provision of the Penal Code which provided for substitution of an alternate for an original juror after jury deliberations had begun. The court found this to be constitutionally permissible and not in violation of the right of trial by jury, provided good cause was shown, and the jury was instructed to begin deliberations anew.

The *Federal Rule of Criminal Procedure*, Rule 24(c), while providing for alternate jurors, permits substitution for regular jurors only prior to the time the jury retires to consider its verdict. However, it has been suggested that this rule be amended "to cover the situation where a juror proves incapacitated during deliberations or is excused for some other reason." 8A *Moore's Federal Practice*, ¶ 24.05, page 24-36. The Advisory Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has proposed a change in Rule 24(c) so as to permit alternate juror substitution after jury deliberation has begun.

[11, 12] We find that Rule 1:8-2(d) in providing that for good cause shown, an alternate juror may be substituted for a regular juror after deliberations have begun, does not offend our constitutional guaranty of trial by jury. Certainly good cause appeared where the juror in question

stated that in his then nervous and emotional condition, he did not think he could render a fair verdict. Of course, when an alternate juror is so substituted, the jury must be instructed in clear and unequivocal terms that it is to begin its deliberations anew and that, as the trial judge stated herein, "you are in effect going to have to start over."

[13] The rule is discretionary with the trial court because a situation might arise where it would be unwise to utilize this procedure. The longer the period of time the jury deliberates, the greater is the possibility of prejudice should a juror be substituted or replaced. However, in the circumstances presented herein we find that utilization of the rule provision was not improper. *See State v. Trent*, 157 *N. J. Super.* 231 (App. Div. 1978).

No rule is immutable. The court is always receptive to improvements in our procedures. *See In re National Broadcasting Corporation*, 64 *N. J.* 476 (1974). If it appears that an existing rule, although constitutional, creates trial problems, attention should be given to its continued usefulness. Our Civil and Criminal Practice Committees might well reassess the present utility of this amendment in the light of our five and one-half years experience with it.

A further contention made by defendant is that even though the 1972 rule amendment be held to be constitutional, the trial court committed error, after it replaced juror number 11 with an alternate juror, in not having its supplemental charge read to the substitute juror. It seems to be undisputed that when the supplemental charge was given to the jury as to the distinction "between first and second degree murder," the alternate jurors were not present in the courtroom and did not hear the supplemental charge.

[14] The alternate jurors should have been brought into the courtroom to hear such charge. Rule 1:8-2(d) provides that if alternate jurors are not discharged following

and is one of mixed fact-law, the reviewing court conducts a sweeping surveillance of the question practically the equivalent of *de novo* redetermination.[1] *Beckwith v. United States*, 425 *U. S.* 341, 348, 96 *S. Ct.* 1612, 48 *L. Ed.* 2d 1 (1976); *Spano v. New York*, *supra*, 360 *U. S.* at 316, 79 *S. Ct.* 1202 (1959); *State v. Conforti*, 44 *N. J.* 422, 428, n. 2 (1965); *State v. Smith*, 32 *N. J.* 501, 544, 549 (1960), *cert.* den. 364 *U. S.* 936, 81 *S. Ct.* 383, 5 *L. Ed.* 2d 367 (1961), and see *State v. Johnson*, 42 *N. J.* 146, 160, n. 2 (1964).

In view of the foregoing, and the circumstances that all subordinate facts relating to the voluntariness of this confession were essentially uncontested (the court had available the verbatim transcript of a taping of the entire interrogation at the police station), the Appellate Division had the ultimate responsibility of determining independently for itself whether the State had carried its burden of establishing *beyond a reasonable doubt* that the confession was voluntary, *i.e.*, that "neither the body nor mind" of Miller was "twisted until he [broke]." *Culombe v. Connecticut*, *supra*, 367 *U. S.* at 581, 81 *S. Ct.* at 1860. That the Appellate Division cannot fairly be said to have erred in finding that the State did not meet its burden is best demonstrated by setting forth its opinion substantially in its entirety, as follows:

"PER CURIAM

"Defendant was convicted by a jury of murder in the [illegible] degree. He appeals on a number of grounds. The principal one of these is a challenge to the voluntariness of a confession.

"We are extraordinarily fortunate in having before us the transcript of a tape recording made during the interrogation which led to the confession. This obviates any

[1] If there are contested issues as to subordinate facts involving credibility of witnesses, deference may be accorded any fact-findings thereon by the trial judge. See *State v. Boudreaux*, 92 *N. J. Super.* 20, 30 (App. Div.) *certif. den. sub nom. State v. Duffy*, 53 *N. J.* 69, 247 (1969).

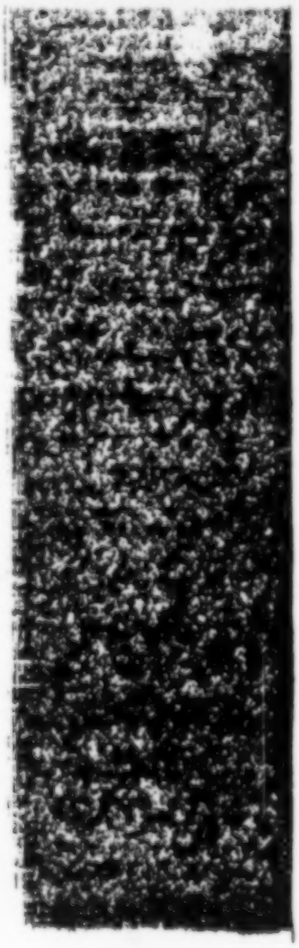
need to speculate with respect to that which transpired. Operating, then, from this unique vantage point, we first declare our allegiance to the 'decent' hope that a guilty man may stub his toe. *State v. McKnight*, 52 *N. J.* 35, 52 (1968). Then we deplore the techniques and tactics which extracted this confession and which, in our judgment, denied defendant due process of the law.

"A *Miranda* (*Miranda v. Arizona*, 384 *U. S.* 436 [86 *S. Ct.* 1602, 16 *L. Ed.* 2d 694] (1966)) *voir dire* was held. Thereafter the judge found, in findings adequately supported by credible evidence in the whole record (*State v. Johnson*, 42 *N. J.* 146 (1964)), that *Miranda* warnings were given and in a timely manner. Then the trial judge, recognizing the 'only real problem' as being one of 'whether or not there was any enjolery, inducement, combination thereof that overcame the will of the defendant so that his subsequent answers to the several questions were not, "voluntary",' and relying upon the definition of 'voluntary' found in *Schneckloth v. Bustamonte*, 412 *U. S.* 218 [93 *S. Ct.* 2041, 36 *L. Ed.* 2d 854] (1973), determined the confession to be admissible. He said,

> I don't think there was any trickery either apparent or inferable in this statement. The most that can be said as [defense counsel] has indicated a promise of help. There is no question that is in the statement, but I do not find that promise was such as to cause this confession to be inadmissible and therefore it will be received in evidence subject to certain deletions about which we should talk now I presume.

"We are clearly persuaded of error in this determination.

"The tape transcript must be read in its entirety for its full aroma to be savored. The interrogation began (at two o'clock in the morning) gently enough with a recitation of an earlier discussion between the interrogating trooper and defendant at the latter's place of work. It prodded defendant (almost kindly; the trooper con-



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(1961); *Olmstead v. United States*, 277 *U. S.* 438, 485, 48 *S. Ct.* 564, 72 *L. Ed.* 944 (1928) (Justice Brandeis, dissenting).

This Court has been equally faithful to these high principles. In *State v. Macri*, 39 *N. J.* 250, 266 (1963), Justice Jacobs stated:

> State judges, no less than federal judges, have the high responsibility of protecting constitutional rights. While they, no less than law enforcement officers, are disturbed when the guilty occasionally go unpunished, they tolerate that as the incidental cost of insuring the continued effectiveness of the guaranties afforded by the Constitution to all of us as free men.

All members of this Court, each conscientiously voting his own views on the merits of this troublesome issue, are bound at least to realize that an affirmance of the conviction in this case signals to the law-enforcement community that the method of interrogation of this defendant resulting in the confession before us is unexceptionable and may be freely practiced. I cannot join in such a signal.

All members of the Court agree that an involuntary confession — one extracted from a suspect by physical or psychological coercion on the part of the police — cannot be used in a trial of the suspect, as a matter of his right not to be deprived of his liberty without due process. *Brown v. Mississippi*, *supra*, 297 *U. S.* 278, 56 *S. Ct.* 461, 80 *L. Ed.* 682 (1936); *McCormick on Evidence* (1972) § 149, p. 317. Although the cases recognize that no single test of involuntariness can be formulated, the essence of the controlling rationale is found in the statement in *Culombe v. Connecticut*, 367 *U. S.* 568, 602, 81 *S. Ct.* 1860, 1879, 6 *L. Ed.* 2d 937 (1961):

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if

his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. * * * The line of distinction is that at which governing self-direction is lost, and compulsion, of whatever nature or however infused, propels or helps to propel the confession.

Another view of the matter, drawing from earlier cases, was reformulated in *Malloy v. Hogan*, 378 *U. S.* 1, 7, 84 *S. Ct.* 1489, 1493, 12 *L. Ed.* 2d 653 (1964), where the Court said:

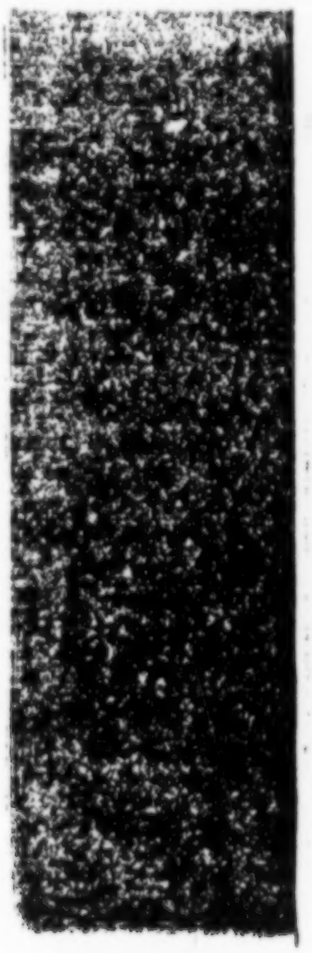
> * * * the constitutional inquiry is not whether the conduct of state officers in obtaining the confession is shocking, but whether the confession was 'free and voluntary: that is [it] must not be extracted by any sort of threat or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence * * *' (emphasis added).

In *Miranda v. Arizona*, 384 *U. S.* 436, 448, 86 *S. Ct.* 1602, 1614, 16 *L. Ed.* 2d 694 (1966), the Court noted:

> * * * we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. * * * this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.

No two cases are alike; all must be decided on the totality of the circumstances. But ultimately "neither the body nor mind of an accused may be twisted until he breaks." *Culombe v. Connecticut*, *supra*, 367 *U. S.* at 581, 81 *S. Ct.* at 869.

Of importance to a resolution of this appeal is an understanding of the burden of proof of the State to establish the voluntariness of an impugned confession and of the scope of *review* by an appellate court on such an issue. This Court has plainly established the burden of proof on the State as that of proving voluntariness of a confession beyond a reasonable doubt. *State v. Yough*, 49 *N. J.* 587, 601 (1967); *State v. Kelly*, 61 *N. J.* 283, 294 (1972). As to scope of appellate review, since the issue is of constitutional dimension



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D: No.
T: I know you don't. But, like I noted before, we all have problems.
D: Right.
T: Am I right?
D: Yeah, you said this over there at the plant.
T: And you agree with me?
D: Yes, sir.
T: I have problems and you have.
D: Right.
T: Now, how do you solve a problem?
What depends on the problem.
Your problem, how do we solve it? How are we going to solve it?
D: This I don't know.
T: Do you want me to help you solve it?
D: Yeah.
T: You want me to extend all the help I can possibly give you, don't you?
D: Right.
T: Are you willing to do the same to me?
D: Yeah.
T: Now, I feel . . .
D: Yeah.
T: . . . who in ever, whoever is responsible for this act . . .
D: Yeah.
T: He's not a criminal. Does not have a criminal mind. I think they have a problem.
D: Uh, huh.
T: Do you agree with me?
D: Yeah.
T: They have a problem.
D: Right.
T: A problem, and a good thing about that Frank, is a problem can be rectified.
D: Yeah.
T: I want to help you, I mean I really want to help you, but you know what they say, God helps those who help themselves, Frank.
D: Right.
T: We've got to get together on this. You know what I'm talking about, don't you?
D: Yeah, especially if they're trying to say that, you know, that like you say, I'm identified and my car's identified, and uh, we got to get together on this.
T: Yes we do. Now, that's only a few of the items . . .
D: Uh, huh.

T: . . . that we have here. Your problem, I'm not, let's forget this incident, okay . . .
D: Yeah.
T: . . . let's forget this incident, let's talk about your problem. This is what, this is *what I'm concerned with, Frank, your problem.*
D: Right.
T: If I had a problem like your problem, I would want you to help me with my problem.
D: Uh, huh.
T: Now, you know what I'm talking about.
D: Yeah.
T: And I know, and I think that, uh, a lot of other people know. You know what I'm talking about. *I don't think you're a criminal, Frank.*
D: No, but you're trying to make me one.
T: No I'm not, no I'm not, but I want you to talk to me so we can get this thing worked out. This is what I want, this is what I want, Frank. I mean it's all there, it's all there. I'm not saying . . .

"The will-abrading grind continued:

D: If she [the victim] was to walk in here now, I wouldn't know, know that she was the girl that, uh, you're talking about.
T: But you were identified as being there talking to her minutes before she was . . . probably this thing that happened to her. How can you explain that?
D: I can't.
T: Why?
D: I don't know why, but I, I, you know, how can I explain something that I don't know anything about.
T: *Frank, look, you want, you want help, don't you Frank?*
D: Yes, uh huh, yes, but yet *I'm, I'm not going to admit to something that, that I wasn't involved in.*
T: *We don't want you to, all I want you to do is talk to me, that's all. I'm not talking about admitting to anything Frank.* I want you to talk to me. I want you to tell me what you think. I want you to tell me how you think about this, what you think about this?
D: What I think about it?
T: Yeah.
D: I think whoever did it really needs help.
T: And that's what I think and that's what I know. *They don't, they don't need punishment, right? Like you said, they need help.*

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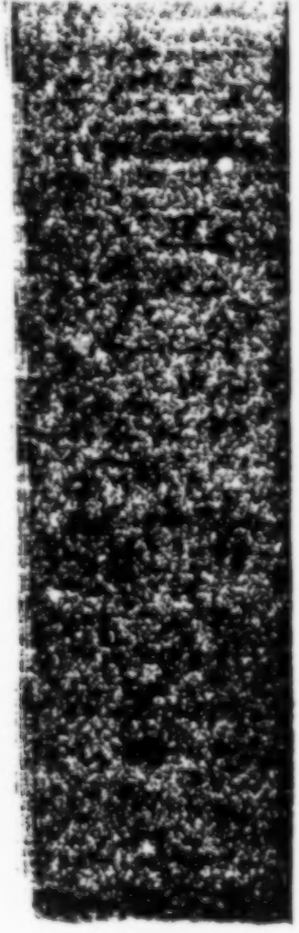

timually addressed defendant both patronizingly and by his first name) about his whereabouts and activities on the previous day. Then a minor discrepancy in defendant's timetable arose. The trooper pressed his advantage, again gently. 'Okay, now,' he told defendant, 'this is a problem.' Defendant said, 'I realize this . . .'

"Then the trooper pointed out that defendant's vehicle had some damage, some red clay or dirt, and[1]

T: There was blood found on the left front interior portion of your vehicle, tonight, fresh blood.
D: Fresh blood?
T: Yes, sir. This is very, very serious.
D: I realize this.
T: That's point 3. * * *

"Then came the first significant police statement, assertedly untrue because as defendant graphically points out in his brief, 'no evidence at all of this crucial fact was presented at trial.'

T: We have a witness, Frank, now this is point 4. We have a witness who identified your car, who, no, I'm, I'm sorry, let me, I shouldn't say your car, who identified a vehicle that fits the description of your car, at this girl's home, speaking with her, telling her something about a cow being loose. Someone who was there who wanted to help her, they didn't want to hurt this girl, they didn't want to hurt this girl, Frank, they wanted to help her. You see, I know this, I know that, . . .
D: Yeah.

"If this was untrue, what followed immediately thereafter was obviously designed to capitalize on the chicane:

T: . . . because I can appreciate that, because I would have done the same thing. If there was something to be rectified, or

[1]In transcript quotations hereafter, 'T:' signifies the question or comment from the trooper, and 'D:' signifies defendant's response. Emphasis in any of the quotations which follow from the tape transcript is, of course, added.

if somebody had a problem, I would have done the same thing. I would have wanted to help her. The vehicle that came onto the property . . .
D: Right.
T: . . . fits the description of your vehicle.
D: It does.
T: Yes. Now, that's the fourth point. And when I say fits the description, what I mean, Frank, is it fits the description to a T, and as we talked about before, how many other vehicles are there like yours in the County right now?
D: There shouldn't be too many, if any . . .
T: If any . . .
D: . . . because of the damage on the right-hand side.
T: Now, what would your conclusion be under those circumstances, if someone told you that?
D: I'd probably, uh, have the same conclusion you got.
T: Which is what?
D: That I'm the guy that, that did this.
T: That did what?
D: Committed this crime.

"The trooper then told defendant that 'we have a physical description * * * from another witness' which 'fits you and the clothes you were wearing.' Defendant also challenges the truthfulness of this statement. In any event, that which had proceeded provided all the stage that was needed for that which followed. The trooper embarked doggedly on a campaign marked by (1) his insistence that defendant was not a criminal and did not have a criminal mind and (2) persistent offers 'to help.' Typical of that which was to occupy a good portion of the balance of this fifty-eight minute grilling was what then transpired:

T: Frank, I don't think you're a criminal. I don't think you're a criminal. I don't think you have a criminal mind. As a matter of fact, I know you don't have a criminal mind, because we've been talking now for a few hours together, haven't we?
D: Right.
T: Right?
D: Yeah.
T: You don't have a criminal mind.

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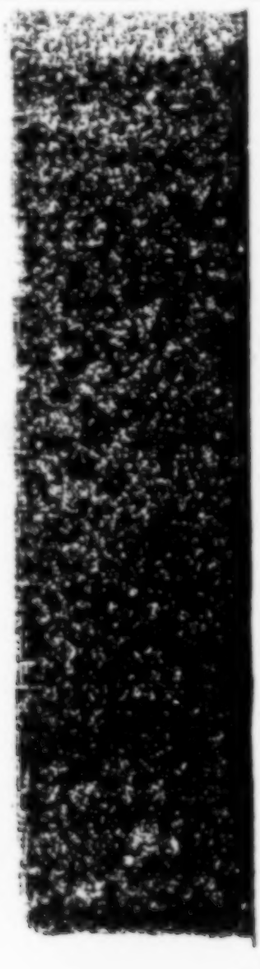


T: Honest, Frank? It's got to come out. You can't leave it in. It's hard for you. I realize that, how hard it is, how difficult it is, I realize that, but you've got to help yourself before anybody else can help you. And we're going to see to it that you get the proper help. This is our job, Frank. This is our job. This is what I want to do.

D: By sending me back down there.

T: Wait a second now, don't talk about going back down there. First thing we have to do is let it all come out. Don't fight it because it's worse, Frank, it's worse. It's hurting me because I feel it. I feel it wanting to come out, but it's hurting me, Frank. You're my brother, I mean we're brothers. All men on this, all men on the face of this earth are brothers, Frank, but you've got to be completely honest with me.

D: I'm trying to be, but you don't want to believe me.

T: I want to believe you, Frank, but I want you to tell me the truth, Frank, and you know what I'm talking about and I know what you're talking about. You've got to tell me the truth. I can't help you without the truth.

D: I'm telling you the truth. Sure, that's her blood in the car because when I seen the way she was cut I wanted to help her, and then when she fell over I got scared to even be involved in something like this, being on parole and . . .

T: I realize this, Frank, it may have been an accident. Isn't that possible, Frank? Isn't that possible?

D: Sure, it's possible.

T: Well, this is what I'm trying to bring out, Frank. It may be something that, that you did that you can't be held accountable for. This is, I can help you, I can help you once you tell me the truth. You know what I'm talking about. I want to help you, Frank. I like you. You've been honest with me. You've been sincere and I've been the same way with you. Now this is the kind of relationship we have, but I can't help you unless you tell me the complete truth. I'll listen to you. I understand, Frank. You have to believe that, I understand. I understand how you feel. I understand how much it must hurt you inside. I know how you feel because I feel it too. Because some day I may be in the same situation Frank, but you've got to help yourself. Tell me exactly what happened, tell me the truth, Frank, please.

D: I'm trying to tell you the truth.

T: Let me help you. It could have been an accident. You, you've got to tell me the truth, Frank. You know what I'm talking about. I can't help you without the truth. Now you know and I know that's, that's, that's all that counts, Frank. You know and I know that's what counts, that's what it's all about. We can't hide it from each other because we both know, but you've got to be willing to help yourself. You know, I don't think you're a criminal. You have this problem like we talked about before, right?

D: Yeah, you, you say this now, but this thing goes to court and everything and you . . .

T: No, listen to me, Frank, please listen to me. The issue now is what happened. The issue now is truth. Truth is the issue now. You've got to believe this, and the truth prevails in the end, Frank. You have to believe that and I'm sincere when I'm saying it to you. You've got to be truthful with yourself.

D: Yeah, truth, you say in the end, right? That's why I done three and a half years for . . .

T: Wait, whoa . . . whoa.

D: . . . for a crime that I never committed because of one stinkin detective framing me. . . .

T: Frank, Frank.

D: . . . by the name of Rocco.

T: Frank, you, you're talking to me now. We have, we have a relationship, don't we? Have I been sincere with you, Frank?

D: Yeah, you . . .

T: . . . Have I been honest?

D: . . . Yes.

T: Have I defined your problem, Frank? Have I been willing to help you? Have I stated I'm willing to help you all I can?

D: Yes.

T: Do I mean it?

D: Yes.

T: Whenever I talk to anybody I talk the same way, because you have a very, very serious problem, and we want to prevent anything in the future. This is what's important, Frank, not what happened in the past. It's right now, we're living now, Frank, we want to help you now. You've got a lot more, a lot more years to live.

D: No, I don't.

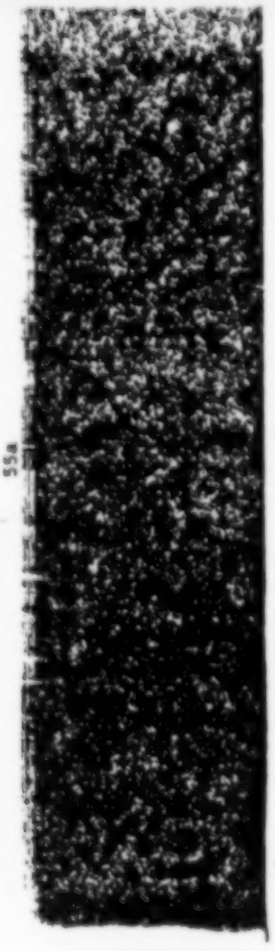
T: Yes, you do.

D: No, I don't.

T: Don't say you don't. Now you've got to tell me.

D: Not after all this, because this is going to kill my father.

T: Listen, Frank. There is where you, the truth comes out. Your father will understand. This is what you have to understand, Frank. If the truth is out he will understand. That's the most important thing, not, not what has happened, Frank. The fact that you were truthful, you came forward and you said, look I have a problem. I didn't mean to do what I did. I have a problem, this is what's important, Frank. This is very important, I got, I, I got to get closer to you, Frank. I



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D: Right.

T: They don't need punishment. They need help, good medical help.

D: That's right.

T: . . . to rectify their problem. *Putting them in, in a prison isn't going to solve it, is it?*

D: No, sir. I know, I was in there for three and a half years.

T: That's right. That's the, that's not going to solve your problem is it?

D: No, you get no help down there. The only thing you learn is how to, you know . . .

T: Well, let's say this Frank, suppose you were the person who needed help. What would you want somebody to do for you?

D: Help me.

T: In what way?

D: In any way that they, they see, you know, fit, that it would help me.

"The trooper induced defendant to say that whoever committed the deed probably had a mental problem. Then he asked defendant if he had ever been "examined." Upon being advised that he had been tested, the trooper then directed his energies to convincing defendant that he 'might not be responsible for' his acts but that the blame was in others for their inability to help him.

T: Well, then did you still feel this way that something might happen it would be their fault because, *as far as I'm concerned if something did happen, it's not your fault*, its their fault . . .

D: Right.

"The trooper acknowledged that defendant was becoming 'very, very nervous.' The time had come.

T: Now listen to me Frank. This hurts me more than it hurts you, because I love people.

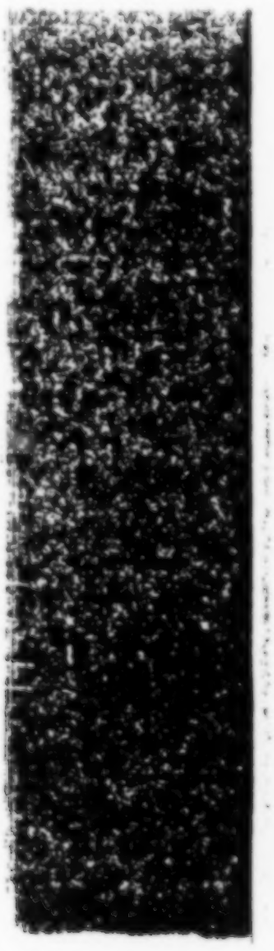
D: It can't hurt you anymore than it hurts me.

T: Okay, listen Frank, I want you . . .

D: I mean even being involved in something like this.

T: Okay, listen Frank. If I promise to, you know, do all I can with the psychiatrist and everything, and we get the proper help for you, and get the proper help for you, will you talk to me about it?

D: I can't talk to you about something I'm not . . .



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T: Alright, listen Frank, alright, honest. I know, I know what's going on inside you, Frank. I want to help you, you know, between us right now. I know what going on inside you, Frank, you've got to come forward and tell me that you want to help yourself. You've got to talk to me about it. This is the only way we'll be able to work it out. I mean, you know, listen, I want to help you because you are in my mind, you are not responsible. You are not responsible, Frank. Frank, what's the matter?

D: I feel bad.

T: Frank, listen to me, honest to God, I'm, I'm telling you, Frank. (inaudible). I know, it's going to bother you, Frank, it's going to bother you. It's there, it's not going to go away, it's there. It's right in front of you, Frank. Am I right or wrong?

D: Yeah.

T: You can see it Frank, you can feel it, you can feel it but you are not responsible. This is what I'm trying to tell you, but you've got to come forward and tell me. Don't, don't, don't let it eat you up, don't, don't fight it. You've got to rectify it, Frank. *We've got to get together on this thing, or I, I mean really, you need help, you need proper help and you know it, my God, you know, in God's name you, you, you know it. You are not a criminal, you are not a criminal.*

"That was enough. Defendant had been told in the name of God he was not a criminal.

D: Alright. Yes, I was over there and I talked to her about the cow and left. I left in my car and I stopped up on the road where, you know, where the cow had been and she followed me in her car . . .

"Even the recitation of the details was interrupted with relentless and successful Svengalian efforts. At one point the trooper interjected, 'Let it come out, Frank. I'm here, I'm here with you now. I'm on your side, I'm on your side, Frank. I'm your brother, you and I are brothers Frank. We are brothers, and I want to help my brother.'

"Defendant's continued insistence that despite his presence at the scene, he was not the killer could not long resist the tremendous psychological pressure.

T: You killed this girl didn't you?

D: No, I didn't.

v. *Hogan*, *supra*, at p. 411 above (378 *U. S.* at 7, 84 *S. Ct.* 1489); *State v. Smith*, *supra*, 32 *N. J.* at 542; *State v. Cole*, 136 *N. J. L.* 606, 611 (E. & A. 1947).

While length of time and place of interrogation are conditions bearing upon the totality of circumstances to which consideration must be given, and it is true that only the last hour of the confrontation was at a State police station, this episode had been immediately preceded by almost an hour of interrogation at defendant's work place and about 7 hours of detention at the police station in the early morning hours. But the significant thing here is that only a small part of the taped episode was interrogation in any legitimately investigative sense. For the most part, it was plainly, bluntly and persistently an effort to break the will of the defendant. The tactic was an appeal to his emotions and his need for medical help and the misleadingly comforting assurances of the trooper, as defendant's "brother," hypnotically reiterated at length, that he was not a "criminal" requiring imprisonment and that he must unburden himself as a prelude to the "help" which would be provided by the State to assuage his "problem." *Cf. Leyra v. Denno*, 347 *U. S.* 556, 560–561, 74 *S. Ct.* 716, 98 *L. Ed.* 948 (1954); and *see Miranda v. Arizona*, *supra*, 384 *U. S.* at 450, 86 *S. Ct.* 1602. The total physical collapse of the defendant at the end, after repeated earlier assurances of defendant to the trooper that he was not involved in the crime, cogently evidences the effect of the trooper's blandishments on defendant's mind and emotions. A will resolved not to confess was coerced into one to do just that.

The opinion of the Appellate Division notes that "[t]he tape transcript must be read in its entirety for its full aroma to be savored." The members of this Court have not only read the transcript but listened to the entire tape. The experience, to me, corroborates the impression of the Appellate Division as to the gentleness of the commencement of the colloquy, but it also communicates the inception and gradual increase of a tone of urgency, insistence and pressure in the trooper's voice as he bears down on his subject. If the sole object of police interrogation is detection and procurement of evidence of crime the trooper cannot be faulted. But if the values underlying the privilege against self-incrimination in a civilized society still live, as assuredly they do, *see State v. Deatore*, 70 *N. J.* 100 (1976); *McCormick on Evidence*, *op. cit.*, *supra*, at p. 315, they may not be eroded by judicial solicitude for the affirmance of a conviction of an apparently guilty person at the expense of a dispassionate evaluation of a contention that a confession was extracted from a defendant by overbearing his free will. In my judgment, the State has fallen far short of its obligation to establish beyond a reasonable doubt (if at all) that that did not happen in the case of this defendant. If I am right, the conviction must be reversed on that ground *per se*. *Chapman v. California*, 386 *U. S.* 18, 23, 87 *S. Ct.* 824, 17 *L. Ed.* 2d 705 (1967).

Although not strictly material to the issue before us, there is a substantial possibility that even were defendant acquitted because of the inadmissibility of the confession, he could be committed civilly under *R.* 4:74–7 in view of his prior mental history, the circumstances in the instant case pointing to his implication in this murder and the "preponderance-of-the-evidence" rule applicable in commitment law, as distinguished from that of "beyond a reasonable doubt" in criminal cases. See *State v. Krol*, 68 *N. J.* 236, 257 (1965). Accordingly, the alternative potentialities facing the Court in determining this matter are not necessarily confined to affirming the conviction or setting the defendant free.[2]

II

The circumstances attending the substitution of an alternate juror during the deliberations of the jury are

[2] I here assume, as is not at all certain, that defendant could not be convicted at a retrial without use of the confession.

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get to make you believe this and I'm, and I'm sincere when I tell you this. You got to tell me exactly what happened, Frank. That's very important. I know how you feel inside, Frank. It's eating you up, am I right? It's eating you up, Frank. You've got to come forward. You've got to do it for yourself, for your family, for your father, this is what's important, the truth, Frank. Just tell me, you didn't mean to kill her. Did you?

"Defendant's capitulation to the superior mind was complete:

D. I thought she was dead or I'd have never dropped her off like that.

"'I mean, Frank,' the trooper said, 'this is hurting me, God listen. I just want you to come out and tell me, so I can help you, that's all.'

"At the end of the interrogation and before a written statement could be prepared, Frank Miller collapsed physically. In his testimony the trooper candidly described it as 'a state of shock. * * * Mr. Miller had been sitting on a chair, had slid off of the chair on to the floor maintaining a blank stare on his face, staring straight ahead and we were unable to get any type of verbal response from him at that time.'

"A first aid squad was contacted. Defendant was taken to a hospital.

"Our concern for the treatment of defendant and the patent denial of due process is substantially tempered by our conviction of defendant's guilt. We now agonize over the necessity for giving an edge to one whom the police authorities reasonably, and very probably correctly, believed to be guilty of a most heinous crime, involving the greatest of all criminal wrongs, murder. But we have no doubt at all of our duty. An overbearing broadside which results in a confession by virtue of intense and mind bending psychological compulsion deserves no better fate at our hands than does the legendary rubber hose. *Chambers v. Florida*, 309 *U. S.* 227 [60 *S. Ct.* 472, 84 *L. Ed.* 716] (1940). We have long cherished a determination that the fair winds of due process shall blow upon the guilty as well as the innocent. We will not here let our gratitude for good police work which ferreted out one who is most probably a murderer, and our abhorrence at the crime he committed, cause us to abandon basic constitutional principles.

"Thus, in the circumstances here, defendant's confession was involuntary in the constitutional sense and is inadmissible. The error in its admission requires a reversal and a new trial.

"Broadly based as is our conclusion of law, we need not further wrestle with subordinate problems related to defendant's claims that the confession was the product of express promises of psychiatric help, such as that there were 'strongly implied' promises of an insanity defense and no prison sentence, that the police lied to defendant in order to obtain the confession and so forth. Our determination also makes it unnecessary for us to decide many other issues raised on the appeal.

* * * * * * *

"Reversed and remanded for a new trial."

I find myself in full accord with the foregoing opinion and its characterization of the trooper's tactics as constituting "[a]n overbearing broadside which result[ed] in a confession by virtue of intense and mind bending psychological compulsion." An aspect of this psychological compulsion which at the same time constitutes an independently sufficient basis for a finding of involuntariness consists of the repeated promises made to the defendant by the trooper that defendant would receive the psychiatric help he needed, not punishment, and that he would not be imprisoned ("that's [prison] (sic) is not going to solve your problem, is it?") because he was not a "criminal," but only had a "problem," impliedly a mental one; society, not defendant, was at fault because it had not properly treated him in prior institutionalization. See the quotation from *Malloy*

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11, in civil and criminal cases, and for "good cause" excuse any of them from service provided the number was not reduced to less than 12. At the end of his charge, a method of selecting 12 to decide the case was provided. No provision is made in the statute for substituting a juror after deliberations had commenced. When the statute was finally amended in 1975 (after this case had been completed), insofar as it has any bearing here, the only change made was to increase the eligible number of alternate j[illegible] to such number as the trial judge deemed appropriate. It is *R.* 1:8-2(d) which was in effect when the instant case was tried. The Rule authorized a trial judge, in his discretion, to substitute an alternate after submission of the case to the jury if "* * * a juror dies or a juror is discharged * * * because he is ill or otherwise unable to continue * * *."[2]

If *R.* 1:8-2(d) made no provision for substitution of jurors after the jury's deliberations had commenced, as is the case in the federal courts, it unquestionably would be facially valid.[3] The statute and *R.* 1:8-2(d) were undoubtedly adopted as a practical method to avoid the danger of a mistrial through death, illness or incapacity of a juror to continue as well as to preserve the time, efforts and expenses of the court, the attorneys, the litigants and all

[illegible]

[2]The issue of whether the rule is invalid because it deals with substantive law rather than practice and procedure, was not raised or argued and need not be decided. *See Winberry v. Salisbury*, 5 N. J. 240 (1950), *cert. den.* 340 *U. S.* 877, 71 *S. Ct.* 123, 95 *L. Ed.* 638 (1950).

[3]*Fed. R. Crim. P.* 24(c) provides that once a case is submitted to the jury alternates must be discharged. It is significant that a proposal had been made that the federal rules be amended to allow for a substitution procedure. However, after being submitted to the Supreme Court for comment, the Court questioned the committee as to whether it was satisfied as to the constitutionality of such provision, and the proposal was withdrawn. See, Orfield, "Trial Jurors in Federal Criminal Cases," 29 *F. R. D.* 83, 86 (1962).

[illegible]

others involved in a protracted trial. The constitutionality of the statute was upheld in *State v. Dolbow*, 117 *N. J. L.* 560, 561 (E. & A. 1937), appeal dismissed 301 *U. S.* 669, 57 *S. Ct.* 913, 81 *L. Ed.* 1331 (1937). Until the jury retires to deliberate on its verdict, if there is good cause to excuse a juror, no statute or rule of law is violated, nor is there any conceivable prejudice to a defendant or the State. However, once the jury begins deliberations and an alternate is substituted the possibilities of prejudice resulting are unlimited. As an example, we need consider only what happened in the instant case in addition to the deficiency found to exist by Judge Conford.

Following the trial judge's charge, the 12 jurors were chosen (improperly, but not prejudicially, as indicated in the majority opinion), sworn and retired to deliberate. The trial judge then had two court attendants sworn to guard the four alternates. He explained to the alternates why they were to be sequestered and said "* * * we will take you upstairs and we will have to keep you up there without talking to anyone until the deliberations have been concluded."[4] Significantly, he failed to instruct them not to discuss the case with each other. We would be naive to believe that at a time when the alternates thought they probably would have no further connection with the case they did not express their personal views on the guilt or innocence of defendant and the possible verdict to be rendered. Therefore, I am convinced that when the alternate became a member of the panel of 12, he brought with him the views of the other three alternates. As indicated, we have no way of knowing what went on during the original jury's deliberations, or what was discussed when the alternate joined them. It is the danger of contamination which must be guarded against and which is to be condemned

[4]At the outset of the trial, before any testimony was taken, the trial judge instructed the jury not to discuss the testimony among themselves until after he had charged the jury.

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recounted in Justice Sullivan's opinion for the Court. In my view, the practice rule, *R.* 1:8-2(d), is not facially invalid, but is susceptible of unconstitutional application, as I believe occurred in this instance.

It is obvious that if a jury which renders a verdict has consulted with one not a juror in the course of its deliberations that verdict is tainted by the potential influence in the ultimate verdict of the participation of the stranger in the deliberations. In principle, the instant situation cannot be [illegible]erentiated from that just posed. Eleven of the jurors who concurred in the verdict were subject for an hour and a half to the views, opinions and influence of the juror subsequently excused. In effect, he was a 13th juror. *See People v. Ryan*, 19 *N. Y.* 2d 100, 278 *N. Y. S.* 2d 199, 224 *N. E.* 2d 710 (Ct. App. 1966); A. B. A. *Standards Relating to Trial by Jury* (Approved Draft 1968) § 2.7 at 81-82. But see *People v. Collins*, 17 *Cal.* 3d 687, 131 *Cal. Rptr.* 782, 552 *P.* 2d 742 (Sup. Ct. 1976), *cert.* den. 429 *U. S.* 1077, 97 *S. Ct.* 820, 50 *L. Ed.* 2d 796 (1977). Indeed, those eleven jurors were exposed to the influence of the discharged juror for a substantially longer period of time than their deliberations with the substituted juror. Moreover, the substituted juror had not been exposed to the deliberations, views and influence of the eleven jurors mutually expressed and exerted before he came upon the sc[illegible]

In the present circumstances, an admonition to a jury that they forget what happened before and start their deliberations anew with the substituted juror cannot excise the taint of an ultimate verdict in respect of the two objections cited above.

I have indicated that I do not believe the practice rule to be facially invalid. By this I mean that if a juror had to be excused at a very early stage in the deliberations the trial judge could exercise his discretion as to whether the period elapsed was so short that, upon instructions to the reconstituted jury to begin deliberations entirely anew, the

extraneous factors would become *de minimis* and the right of jury trial substantially untrammeled. Possibly, also, original deliberations, although extended beyond the very early stages, prior to substitution of a juror, could be held constitutionally harmless on motion for a new trial or on appeal if the deliberations of the reconstituted jury went on for many times the period prior to substitution. Such a situation might have been presented here if the jury deliberations after the substitution and prior to the verdict had extended for a period of days.

I regard the practical utility of the practice rule to warrant saving it from a declaration of facial invalidity. However, fidelity to the constitutional right of jury trial impels me to hold the rule unconstitutional as here applied, for the reasons stated above.

I agree with the Court's disposition of the question raised by defendant concerning the failure to read the supplemental charge to the substituted juror.

I would affirm the judgment of the Appellate Division.

HALPERN, P. J. A. D. (temporarily assigned), dissenting. I am in complete accord with Judge Conford's dissent that defendant's confession was involuntary and, therefore, join him in Point I.

I also agree with Judge Conford that if *R.* 1:8-2(d) is facially valid[1] it was unconstitutionally applied in this case. However, as I have strong reservations as to its facial validity, I deem it advisable to supplement Judge Conford's views on this subject without discussing the conflict which exists in other jurisdictions referred to by the majority and Judge Conford in their opinions.

It is essential that we note at the outset that *N. J. S. A.* 2A:74-2, and its predecessor statutes, permitted a trial judge, in his discretion, to impanel a jury not to exceed

[1]In view of our conclusion that the confession was invalid it is unnecessary to pass upon the facial validity of *R.* 1:8-2(d).

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the Supreme Court's Committee on Model Jury Charges. The transcript of this portion of the charge consists of six typewritten pages in the record. In contrast, in answering the jury's inquiry that he "clarify the definition between first and second degree murder" he merely excerpted portions of his original charge (about two and one-half transcribed pages) and suggested if they needed additional clarification to ask for it.

I know of no case in the annals of the law, nor have any been brought to my attention, where absent a waiver a verdict was held valid if all the jurors rendering the verdict did not hear the trial judge's entire instructions. No sound reason is presented which should impel us to adopt a new principle of law, and discard what has been a principle of justice so deeply rooted as to be deemed a fundamental and required practice, when to do so is based on pure conjecture. The trial judge's deliberate failure to repeat his supplemental charge to the alternate, in the face of the requirement of *R.* 1:8-2(d), defense counsel's request for him to do so and the denial of the motion for a mistrial, deprived defendant of a fair trial and due process of law.

Accordingly, for the reasons expressed, I would reverse the conviction and order a new trial.

PASHMAN, J., dissenting and concurring in part. I am convinced that this defendant's confession was involuntary and join in Point I of Judge Conford's dissent.

I conclude that *R.* 1:8-2 (d), providing for the substitution of an alternate juror for a regular juror after deliberations have begun, is constitutionally valid on its face. So long as the members of the original jury are specifically instructed to begin deliberations anew when a substitution is made, the defendant is not prejudiced, and the spectre of a mistrial at such a late stage is avoided. It should be noted that the judicial economies made possible by this procedure will redound to the benefit of numerous defendants whose cases will not be put off by the unnecessary

retrial of a time-consuming case. Thus, I concur in the conclusion of the majority, *see ante* at 405-406 on this point.

However, I am unable to accept the premise that the failure of the alternate juror to hear a recharge differentiating first and second degree murder was harmless. All jurors -- both deliberating and alternate -- must hear the same orders and instructions of the court. I join in Judge Halpern's dissent, *see ante* at 431-432 on this point.

For reversal and reinstatement of conviction—Justices SULLIVAN, CLIFFORD, SCHREIBER and HANDLER—4.

For affirmance—Justice PASHMAN and Judges CONFORD and HALPERN—3.

as a denial of due process when we are required to speculate if a verdict is tainted. In my view, defendant in this case was tried by either 13 or 16 jurors contrary to *N. J. Const.* (1947), Art. 1, par. 9 and *R.* 1:8-2(d). When an individual's freedom is at stake, a court should not be required to speculate whether he received a fair trial in accordance with law and due process.

Another problem which deserves our considered judgment, since the issue involved is novel, is whether the circumstances surrounding the trial judge's decision to excuse the juror were sufficiently compelling to justify his action. The only colloquy that ensued between the juror who was excused and the trial judge follows:

> JUROR NUMBER 11: Question. May I be dismissed from this jury because I appear to be too nervous and nervousness is affecting my judgment of this case? I want to be honest. Except I am nervous. I have to be honest. It is affecting my judgment and if you don't mind, I would like to be replaced with someone.
> THE COURT: Don't you think you can render a fair verdict?
> JUROR NUMBER 11: No, I don't.

When a juror seeks to be excused after deliberations have begun, it is the trial judge's duty to exert every reasonable effort to avoid the consequences that would necessarily flow from a granting of the request. The trial judge must make careful inquiry into the substance of the request. Admittedly, he must approach the issue with extreme caution and delicacy to avoid a mistrial or tainting the jury's deliberations. Normally, such inquiry would be made out of the jury's presence, but in the presence of all counsel and defendant. See the discussion concerning the extent to which the trial judge should examine the juror's reasons for wanting to be excused. *State v. Trent*, 157 *N. J. Super.* 231 (App. Div. 1978). Here, the juror's reason for asking to be excused was "* * * I appear to be too nervous and nervousness is affecting my judgment * * * and if you don't mind, I would like to be replaced

with someone." The trial judge asked only one question before excusing him "Don't you think you can render a fair verdict?"

It is my view when the request was made compelling circumstances did not exist for excusing the juror, and that defense counsel's motion for a mistrial, based on the existing record, should have been granted. I assume every juror in a murder case is concerned and nervous to some degree, but that does not warrant excusing him from his sworn duty. Should we be compelled to speculate why and to what extent this juror suddenly became nervous after a four-day trial and about 90 minutes of deliberation? Must a trial judge accept his bald statement that he is nervous and wants to be replaced? No judge should have to do so because of the many speculative reasons that come quickly to mind. As an example only, he alone may have wanted to acquit or convict defendant and his fellow jurors took a contrary position and were pressuring him to adopt their views. Certainly, if this were the fact, excusing him would be unwarranted. Or, could it be one of the deficiencies of *R.* 1:8-2(d) that a juror, knowing that alternates were waiting in the wings, took what he considered an easy way out? Or, perhaps, the other 11 jurors suggested it to him. In short, since we must speculate as to his reason, the trial judge's action in excusing him under the existing circumstances was a mistaken exercise of discretion.

Finally, I am unable to agree that error did not result from the failure of the alternate juror to hear the supplemental charge. The majority admits the alternate jurors should have been brought into the courtroom to hear the supplemental charge, but decide that no prejudice resulted.

The difference between first and second degree murder, and the elements to be proven in connection therewith, are probably the most important parts of the charge. In reality, it is the most difficult part of the charge for the jury to understand. The trial judge in charging the jury on this subject utilized verbatim the suggested charge prepared by

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FRANK M. MILLER, JR.,	:	
Petitioner,	:	REPORT AND RECOMMENDATION
v.	:	Civil No. 82-1175 (JWB)
PETER J. FENTON, etc., et al.,	:	
Respondents	:	

Frank M. Miller, who has been convicted of the murder of a 17-year old girl and is now confined for life, petitions for habeas corpus under 28 U.S.C. § 2254. On direct appeal the Appellate Division, in an unreported decision, reversed, holding that petitioner's confession was involuntary. The Supreme Court of New Jersey, however, granted the State's petition for certification and, in a four to three decision, reinstated the conviction.[1] State v. Miller, 76 N.J. 392, 423 (1978). On this application petitioner contends that "the method used to obtain [his] confession was coercive and violative of due process" because it was the result of "tremendous psychological pressure as well as express promises by the police of psychological help and implied promises of no prosecution or imprisonment" (Petition, ¶12).

The following facts, which are recited at 76 N.J. 396, 397, are not in dispute and under 28 U.S.C. § 2254(d) are "presumed to be correct":

1. In opposing the State's application petitioner exhausted state remedies as required by 28 U.S.C. § 2254(b). Picard v. Connor, 404 U.S. 270 (1971).

> ...On the morning of August 13, 1973, Deborah Margolin, 17 years of age, was sunbathing on the patio of her parents' farmhouse in East Amwell Township, Hunterdon County. She was wearing a two-piece bathing suit at the time. While she was there a white car drove up to the house and the driver sounded the car's horn several times. The girl's brothers, Daniel and Bernard, from upstairs windows in the house, observed a dusty white vehicle with two severe dents in its right side and its trunk tied shut. The male driver wore loose fitting clothes and "looked like a factory worker." Daniel heard the man tell Deborah that a heifer was loose down at the bottom of the driveway. The girl told her brother that she didn't need any help, got into a family car and drove down the driveway. She was never seen alive again.
>
> Later that afternoon when the girl failed to return home, a search of the area was made and Deborah's body was found face down in a stream. Her throat had been slashed, severing her windpipe and jugular vein. The girl was nude except for a part of her bathing suit around her waist. Stab and cutting wounds had been inflicted in her pelvic area and vagina. Her right breast had been cut.
>
> The description of the car in the driveway given to the police directed immediate attention to [petitioner] who was then on parole from a 1969 conviction of carnal abuse and who had been arrested on July 10, 1973 on another morals charge. The arresting officer in that case, who was also participating in the investigation of the Deborah Margolin homicide, noted that the description of the car seen in the Margolin driveway was similar to the one owned by [petitioner]. [Petitioner's] appearance also conformed with the description of the driver of that car given by one of the brothers.

> Two police officers located [petitioner] at approximately 10:50 p.m. that same day and interviewed him at a plastics factory in Flemington where he was employed. After some conversation during which [petitioner] gave the officers permission to examine his car which was parked there, [petitioner] agreed to accompany the officers to the Flemington police barracks for further questioning. They arrived at the barracks at about 11:45 p.m. The questioning began about two hours later and lasted for about 58 minutes...

To determine whether petitioner confessed because his will was overborne consideration must be given to all relevant circumstances, Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973); United States v. Dickens, 695 F.2d 765, 778 (3d Cir. 1982); e.g., whether petitioner was advised of his Miranda[1a] rights, the duration and conditions of his detention, the length of the questioning itself, whether he was subjected to corporal punishment or mental duress, his age, education, intelligence and whether he had had previous experiences with law enforcement officers. In this case there is no question petitioner, age 32, was advised of his Miranda rights; that having been so advised he spoke to the trooper who was interviewing him without invoking his right to an attorney;

1a. Miranda v. Arizona, 384 U.S. 436 (1966).

that in 1969 he was convicted of carnal abuse and sentenced to 12 to 15 years of which he had served 40 months before being paroled;[2] that he had attended high school for more than a year and was sufficiently intelligent to understand what was said to him and what he was doing; that he makes no claim that he was denied food, drink, sleep or ordinary amenity; and that during the interview,[3] which lasted 58 minutes, he asked for and received reassurance that he could stop speaking. (Ex. R-4, p. 2).

The last mentioned inquiry and request for reassurance, coupled with petitioner's continuation of the interview, weighs heavily in determining whether he was aware of his right not to speak at all and of his right to stop speaking whenever he wished and, consequently, as to whether his will was overborne. Petitioner's awareness of his rights having been demonstrated and he, no novice to the criminal justice system, having elected to permit himself to be interviewed, the questioning evinced by Ex. R-4 was, without more, not unconstitutional. Michigan v. Tucker, 417 U.S. 433, 444-5 (1974).

---

2. Ex. R-11, p. 14.

3. Prior to this interview petitioner had been questioned for about 40 minutes, while not in custody, in the parking lot of his place of employment and had then spent approximately two hours in the Flemington Police Barracks kitchen where he was in custody but not questioned.

Petitioner contends that a denial of due process is to be found in the psychological techniques used by the interrogatin trooper. But this Court i: not persuaded that in petitioner's case the approach used was unconstitutional. Cf., Culombe v. Connecticut, 367 U.S. 568 (1961), in which a 33-year old illiterate mental defective who had been classified ab a moron was questioned intermittently from Saturday afternoon until Wednesday night and only confessed after he saw his wife and sick daughter; and Leyra v. Denno, 347 U.S. 556, 559-60 (1954), in which "petitioner was subjected to almost constant police questioning" for 23 1/2 hours, following which he was permitted sleep for an hour and a half, while "suffering from an acutely painful attack of sinus" and was introduced to a police psychiatrist whom he expected to provide medical treatment but who "by subtle and suggestive questions simply continued the police effort of the past days and nights to induce petitioner to admit his guilt * * * [and in which] petitioner's answers indicate[d] a mind dazed and bewildered.— Time after time the petitioner complained about how tired and how sleepy he was and how he could not think..."

Here there is no question that petitioner knew of his right not to speak. And while the interrogation was designed to elicit his responses it was not conducted under circumstances which denied him due process. Put another way, the issue is not

whether in retrospect petitioner would have confessed; it is whether his confession was involuntary because it was produced by conduct which compelled, rather than persuaded him to surrender his due process right to remain silent. (See p. 4, supra).

Considering all the relevant circumstances which obtained, in accordance with Schneckloth v. Bustamonte, supra,[4] and recognizing that a policeman is neither limited to a simple "Did you commit this crime?", nor permitted to interrogate for hours without permitting a suspect sleep, sustenance or amenity, the questioning of the petitioner did not exceed that constitutionally permitted.

It is noted that in the state court the prosecution was required to prove voluntariness of plaintiff's confession beyond a reasonable doubt; on this habeas corpus application, however, it is petitioner who carries the burden of proof, a burden which is not lightened by petitioner's testimony on voir dire that he did not remember any of the interrogation at issue here. (Ex. R-5, 2T106-19 to 116-11). Brown v. Cuyler, 669 F.2d 155, 158 (3d Cir. 1982).

---

4. In that case, the Supreme Court concluded that a determination of voluntariness depended not "on the presence or absence of a single controlling criterion [but on] a careful scrutiny of all the surrounding circumstances." 412 U.S. at 226-7.

In view of the foregoing this Court finds that petitioner has not demonstrated that his confession was unconstitutionally obtained[5] and accordingly recommends that this application be dismissed without evidentiary hearing,[6] Townsend v. Sain, 372 U.S. 293 (1963), but with a certificate of probable cause. 28 U.S.C. § 2253; Alexander v. Harris, 595 F.2d 87, 90 (2nd Cir. 1979).

Respectfully submitted,

John W. Devine
United States Magistrate

Dated: February 23, 1983

5. Cf., Procunier v. Atchley, 400 U.S. 446 (1971).

6. The following exhibits, all in State v. Miller, Hunterdon County Indictment No. 320-M-72, have been received:

R-1	Indictment
R-2	Tape, August 13, 1973
R-3	Tape, August 14, 1973
R-4	Transcript of R-3
R-5	Trial transcript (7 volumes)
R-6	Judgment of Conviction
R-7	Petitioner's Notice of Appeal
R-8	Brief in support of R-7
R-9	Brief in opposition to R-7
R-10	Appellate Division decision
R-11	Petition for Certification
R-12	Reply to R-11
R-13	Order Granting Certification
R-14	State's Supplemental Brief
R-15	State's Supplemental Letter

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
JOHN W. BISSELL
JUDGE

FEDERAL BUILDING
TRENTON, NEW JERSEY 08608

NOT FOR PUBLICATION

June 13, 1983.

FILED
JUN 17 1983
At 8:30 M
ALLYN Z. LITE
Clerk

Paul M. Klein, Esquire
Assistant Deputy Public Defender
State of New Jersey
Office of the Public Defender
Appellate Section
20 Evergreen Place (First Floor)
East Orange, N.J. 07018

Irwin I. Kimmelman, Esquire
Attorney General of the State of New Jersey
By: Daniel Louis Grossman, Esquire
Deputy Attorney General
Division of Criminal Justice
Appellate Section
Post Office Box CN-086
Trenton, N.J. 08625

LETTER-OPINION

Re: FRANK M. MILLER, JR., Petitioner v. PETER J. FENTON, etc., et al., Respondents; Civil Action No. 82-1175.

Gentlemen:

This matter comes before the Court pursuant to the petition of Frank M. Miller, Jr. for a writ of habeas corpus under 28 U.S.C. § 2254. On February 23, 1983, John W. Devine, United States Magistrate, issued to the undersigned his Report and Recommendation, in which he recommended:

> . . . that this application be dismissed without evidentiary hearing, Townsend v. Sain, 372 U.S. 293 (1963), but with a certificate of probable cause.

This Court has conducted its independent review of the record, including analyses of the opinions of the Supreme Court and Appellate Division of the Superior Court of the State of New Jersey. See State v. Miller, 76 N.J. 392 (1978), a four to three decision

upholding the admissibility of Miller's confession, wherein both the majority and dissenting opinions are printed in full. This Court's independent review has also included listening to the ver batim tape recordings of petitioner's interrogation on August 13 and 14, 1973.

In objecting to Judge Devine's Report and Recommendation, petitioner's counsel argues that the Magistrate did not sufficiently address and consider the psychological impact of the interrogation pattern and technique in determining whether Mr. Miller's confession was voluntary.

This Court adopts in full Judge Devine's Report and Recommendation, a copy of which is annexed hereto and incorporated by reference. Supplementing that Report and Recommendation, this Court further determines as follows:

It is quite clear that Judge Devine understood (as does this Court) that the major basis of Miller's petition is his attack upon the psychological impact of the police interrogation. See annexed Report and Recommendation at 1, 5, inter alia. As indicated above, this Court has itself specifically reviewed the record to determine whether petitioner's confession was involuntary for, among other reasons, alleged "tremendous psychological pressure as well as expressed promises by police of psychological help and implied promises of no prosecution or imprisonment." (Petition, ¶ 12.) These very allegations were indeed the focal point of the opinions expressed by the Courts of the State of New Jersey, supra. This Court, as well, determines that petitioner's due process rights were not violated. Petitioner's eventual confession, although indeed the result of psychologically oriented interrogation, was "the product of an essentially free and unconstrained choice", not the result of circumstances where "his will [had] been overborne and his capacity for self-determination critically impaired", Culombe v. Connecticut, 367 U.S. 568, 602 (1961). See also, State v. Miller, supra, 76 N.J. 392, 404-05. In this respect, the tape-recorded interrogation and confession reveal that petitioner was fully oriented at all times and, although prodded by the interrogator's psychologically oriented technique, nevertheless eventually confessed because of his own realization and desire to tell the truth.

For the reasons set forth above, this Court determines that petitioner has not demonstrated that his confession was unconstitutionally obtained, and hereby dismisses the present application without evidentiary hearing but with a certificate of probable cause. 28 U.S.C. § 2253.

Very truly yours,

JOHN W. BISSELL
UNITED STATES DISTRICT JUDGE

JWB/ebj

Att.

HON. JOSEPH H. RODRIGUEZ
Public Defender
Office of the Public Defender
20 Evergreen Place
East Orange, Newc Jersey 07018
(201) 648-3280

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FRANK M. MILLER, JR.	:	
Petitioner,	:	Civil Action No. 82-119
vs.	:	NOTICE OF APPEAL
PETER J. FENTON, etc., et al,	:	
Respondents.	:	

NOTICE is hereby given that Frank M. Miller, Jr., petitioner above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the order of the United States District Judge John W. Bissell, dismissing Mr. Miller's Petition for Writ of Habeas Corpus and certifying probable cause for appeal, filed in this action on the 17th day of June, 1982.

Dated: July 14, 1983

Paul M. Klein
PAUL M. KLEIN
Assistant Deputy
Public Defender

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-5530

FRANK M. MILLER, JR.
Appellant

v.

PETER J. FENTON, Superintendent,
Rahway State Prison,
IRWIN I. KIMMELMAN, Attorney General,
State of New Jersey
Appellees

On Appeal from the United States
District Court for the
District of New Jersey
(D.C. Civ. No. 82-1175)

Argued January 24, 1984

Before: GIBBONS and BECKER, *Circuit Judges*,
and ATKINS, *District Judge**

(Filed August 17, 1984)

JOSEPH H. RODRIQUEZ
Public Defender
CLAUDIA VAN WYK (Argued)
PAUL M. KLEIN
Assistant Deputy Public Defenders
20 Evergreen Place, First Floor
East Orange, NJ 07018

Attorneys for Appellant

* Honorable C. Clyde Atkins, United States District Judge for the Southern District of Florida, sitting by designation.

IRWIN I. KIMMELMAN
Attorney General
ARLENE R. WEISS (Argued)
Deputy Attorney General
Division of Criminal Justice
Appellate Section
Post Office Box CN086
Trenton, NJ 08625

Attorneys for Appellees

OPINION OF THE COURT

BECKER, *Circuit Judge*.

This is a habeas corpus case brought by Frank M. Miller, Jr., who was convicted in New Jersey state court of the murder of Deborah Margolin. In his habeas corpus petition, Miller alleges that his confession to the murder was involuntary, because the police detective's mode of questioning created psychological pressure that induced him to confess against his will. The New Jersey Supreme Court held that the record supported the trial court's conclusion that Miller's confession was "voluntary," and thus admissible under the controlling precedents. We have carefully reviewed the record and conclude that the factual findings of the state court are supported by the record. We therefore conclude that we must accord these findings the presumption of correctness provided for in 28 U.S.C. § 2254(d). *See Patterson v. Cuyler*, 729 F.2d 925 (3d Cir. 1984). Given the findings and the presumption, we cannot say as a matter of law that the mode of interrogation used by the detective who questioned Miller rendered the confession involuntary, and accordingly we will affirm the judgment of the district court denying Miller's application for the writ of habeas corpus.

I. *FACTS AND PROCEDURAL HISTORY*

On August 13, 1973, at about 11:30 a.m., while Deborah Margolin was sunbathing on the porch of her home in rural East Amwell Township, a stranger approached in an automobile and informed her that he had seen a heifer loose at the bottom of the driveway. The stranger offered to help her retrieve the cow. Ms. Margolin declined the offer of help, and then proceeded alone in her brother's automobile to retrieve the heifer. Her brother found the automobile about half an hour later; the keys had been left in the ignition.

When Ms. Margolin failed to return by late afternoon, her family commenced searching for her. Her father eventually found her dead, face down in a creek, with her throat and breast cut. The New Jersey State Police were then called. A number of troopers and detectives arrived on the scene at about 7:30 P.M., and took a description of the car and the stranger from the victim's brothers, who had seen him drive up. Miller, who lived nearby and was known to the troopers, had been convicted in 1969 of carnal abuse and arrested in 1973 for statutory rape. One of the officers, Trooper Scott, recalled that Miller drove a car that matched the one described by the victim's brothers -- an old white car with the trunk tied shut and two dents in the side. Detective Boyce of the State Police confirmed the descriptions of the car and also concluded that the description of the stranger given by the victim's brothers matched Miller's general physical characteristics.

The police located Miller at his place of employment, P.F.D. Plastics in Trenton, at about 10:50 P.M. on the evening of the murder, and questioned him there. Miller agreed to accompany the officers to the police barracks for further questioning, and, without being searched, turned his penknife over to the officers. After spending about seventy five minutes in

the barracks kitchen with Trooper Scott, during which he was not questioned, Miller was taken into an interrogation room by Detective Boyce and read his *Miranda* rights. Miller signed the *Miranda* card, and specifically asked Boyce for a clarification of his right to terminate questioning, which Boyce gave him.[1]

The state police made a tape recording of Miller's statement.[2] Boyce spoke in a soft and friendly -- even sympathetic -- voice. He thus presented himself as a "nice guy," friendly to the suspect and interested in solving his problems. In response to Boyce's questions, Miller first described his activities on the morning of August 13. Boyce then pointed out various discrepancies in Miller's story about how he passed the time during which the murder occurred, the similarity between the description of the car given by the victim's brothers and Miller's car, and other incriminating evidence. At that point, Miller weakened:

> BOYCE: Now, what would your conclusion be under those circumstances, if someone told you that?
>
> MILLER: I'd probably, uh, have the same conclusion you got.
>
> BOYCE: Which is what?
>
> MILLER: That I'm the guy that, that did this.
>
> BOYCE: That did what?
>
> MILLER: Committed this crime.

1. The adequacy of the *Miranda* warnings and waiver are not contested on appeal.

2. We have listened to that tape, and have read the transcript as well (both are part of the record); hence, we are in a position to describe Detective Boyce's and Miller's mood and their relationship during the interrogation.

After this, Boyce shifted gears. Boyce stated that in his opinion, Miller wasn't a "criminal," and that he didn't have a "criminal mind." Rather, Boyce asserted that Miller had a "problem," for which he needed help, not punishment. Boyce then led Miller to talk about his need for help, the psychiatric treatment he received as a condition of his parole from a prior conviction, and his recent statutory rape arrest.

With this background out on the table, Boyce began appealing to Miller's conscience:

> B. Okay, listen Frank, if I promise to, you know, do all I can with the psychiatrist and everything, and we get the proper help for you, and get the proper help for you, will you talk to me about it?
>
> M. I can't talk to you about something I'm not . .
>
> B. Alright, listen Frank, alright, honest, I know, I know what's going on inside you, Frank. I want to help you, you know, between us right now. I know what (sic) going on inside you. Frank, you've got to come forward and tell me that you want to help yourself. You've got to talk to me about it. This is the only way we'll be able to work it out. I mean, you know, listen, I want to help you, because you are in my mind, you are not responsible. You are not responsible, Frank, Frank, Frank, what's the matter?
>
> M. I feel bad.
>
> B. Frank, listen to me, honest to God, I'm, I'm telling you, Frank, (inaudible). I know, it's going to bother you, Frank, it's going to bother you. It's there, it's not going to go

away, it's there. It's right in front of you, Frank. Am I right or wrong?

M. Yeah.

Miller then began, step by step, to make damaging admissions concerning his participation in the murder. At first, he insisted that, although he was with the victim when she was killed, some unknown stranger had actually committed the crime while they were searching for the heifer. Miller insisted that he had tried to get help, but that, when he realized the victim was dead, he had panicked and dropped the body off. Boyce allowed this much to come out, but then challenged Miller, saying "[y]ou killed this girl, didn't you." Miller again denied having committed the crime, after which Boyce changed gears again, telling Miller -- again in soft, pleading tones -- that he could only be helped if he "told the truth" -- admitted the crime. The following exchange then took place.

B. Honest, Frank? It's got to come out. You can't leave it in. It's hard for you, I realize that, how hard it is, how difficult it is, I realize that, but you've got to help yourself before anybody else can help you. And we're going to see to it that you get the proper help. This is our job, Frank. This is our job. This is what I want to do.

M. By sending me back down there.

B. Wait a second now, don't talk about going back down there. First thing we have to do is let it all come out. Don't fight it because it's worse, Frank, it's worse. It's hurting me because I feel it. I feel it wanting to co..e out, but it's hurting me, Frank. You're my brother, I mean we're brothers. All men on this, all men on the face of this earth are

brothers, Frank, but you got to be completely honest with me.

M. I'm trying to be, but you don't want to believe me.

B. I want to believe you, Frank, but I want you to tell me the truth, Frank, and you know what I'm talking about and I know what you're talking about. You've got to tell me the truth. I can't help you without the truth.

M. I'm telling you the truth. Sure, that's her blood in the car because when I seen the way she was cut I wanted to help her, and then when she fell over I got scared to even be involved in something like this, being on parole and . . .

B. I realize this, Frank, it may have been an accident. Isn't that possible, Frank? Isn't that possible?

M. Sure, it's possible.

B. Well, this is what I'm trying to bring out, Frank. It may be something that, that you did that you can't be held accountable for. This is, I can help you, I can help you once you tell me the truth. You know what I'm talking about. I want to help you, Frank. I like you. You've been honest with me. You've been sincere and I've been the same way with you. Now this is the kind of relationship we have, but I can't help you unless you tell me the complete truth. I'll listen to you. I understand, Frank. You have to believe that, I understand. I understand how you feel. I understand how much it must hurt you inside. I know how you feel because I feel it

too. Because some day I may be in the same situation Frank, but you've got to help yourself. Tell me exactly what happened, tell me the truth, Frank, please.

M. I'm trying to tell you the truth.

B. Let me help you. It could have been an accident. You, you've got to tell me the truth, Frank. You know what I'm talking about. I can't help without the truth. Now you know and I know that's, that's, that's all that counts, Frank. You know and I know that's what counts, that's what it's all about. We can't hide it from each other because we both know, but you've got to be willing to help yourself. You know, I don't think you're a criminal. You have this problem like we talked about before, right?

M. Yeah, you, you say this now, but this thing goes to court and everything and you . . .

B. No, listen to me, Frank, please listen to me. The issue now is what happened. The issue now is truth. Truth is the issue now. You've got to believe this, and the truth prevails in the end, Frank. You have to believe that and I'm sincere when I'm saying it to you. You've got to be truthful with yourself.

Miller then began digressing, talking about how he was "framed" by a detective in connection with his prior conviction and put in prison, and how "this is going to kill my father." Boyce continued to redirect Miller toward the murder, and finally the confession came out. The entire interrogation lasted about fifty-eight minutes. There were no threats or explicit promises made, and no physical coercion. Miller, who

was coherent throughout the questioning, passed out at the end.

The state trial court refused to suppress the confession,[3] and Miller was convicted after a four-day trial.[4] A three-judge panel of the Appellate Division of the New Jersey Superior Court reversed unanimously, stating "we deplore the techniques and tactics which extracted this confession and which, in our judgment, denied defendant due process of law." The court's opinion, which is principally composed of quotes from the interrogation transcript, characterizes Boyce's method of interrogation as "psychological pressure," and in a short conclusion invoked the "the fair winds of due process" which "blow on the guilty as well as the innocent."[5]

The New Jersey Supreme Court, in a 4-3 decision, reversed the Appellate Division and reinstated the conviction. *State v. Miller*, 76 N.J. 392, 388 A.2d 218 (1978). The court stated the appropriate legal standard:

> Every case must turn on its particular facts. In determining the issue of voluntariness, and whether a suspect's will has been overborne, a court should assess the totality of all the surrounding circumstances. It should consider the characteristics of the suspect and the details of the interrogation. Some of the relevant factors include the suspect's age, education and intelligence,

3 In declining to suppress the confession, the trial court relied on the absence of an inducement.

4 Miller was sentenced to life imprisonment.

5 The quotes in this paragraph are taken from the unpublished opinion of the appellate division, State v. Miller, No. A-1275-73 (N.J. App. October 27, 1975).

advice as to constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature and whether physical punishment or mental exhaustion was involved. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854, 862 (1973). A suspect's previous encounters with the law has been mentioned as an additional relevant factor. *State v. Puchalski*, 45 N.J. 97, 101, 211 A.2d 370 (1965).

76 N.J. at 402, 388 A.2d at 223. The court then proceeded to make subsidiary findings on the relevant factors, and applying the "totality of the circumstances" standard, held that the use of the "friendly cop" approach by Boyce did not overbear Miller's will. The court relied primarily on the following facts: the interrogation was not excessively long, Boyce at no time misled Miller into thinking he was anything but an interrogating police officer, and Miller understood the significance and probable outcome of confessing to the killing of Deborah Margolin. *Id.* at 403-04, 388 A.2d at 224. The court held that "the interrogation in this case did not exceed the proper bounds and that the voluntariness of defendant's confession could properly have been determined by the trial court to be established beyond a reasonable doubt." *Id.*

Miller petitioned for a writ of habeas corpus in the United States District Court for the District of New Jersey. The petition was referred to a magistrate, who recommended that the writ be denied. The district court agreed, rejecting Miller's contention that the psychological pressure created by the questioning made the confession involuntary in the constitutional sense. The district court held that, based on its

independent review of the evidence, including the tape of the confession, Miller's will was not "overborne" by Boyce's questioning. The court adopted the magistrate's recommendation denying the writ of habeas corpus and granting a certificate of probable cause.[6] This appeal followed.

II. *SCOPE OF REVIEW*

Under 28 U.S.C. § 2254(d), a state court factual finding is entitled to a "presumption of correctness" in a federal habeas corpus proceeding unless one of eight enumerated exceptions apply.[7] The first seven

6. A certificate of probable cause is required to appeal from a decision of the district court denying a writ of habeas corpus. 28 U.S.C. § 2253.

7. Subsection (d) reads as follows:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional

exceptions, which go to the procedural adequacy of the state proceedings, are not applicable to this case. The eighth exception, which we address below, applies where a factual conclusion is not adequately supported by the record as a whole.

The controlling case on the application of the eighth exception in this context is *Patterson v. Cuyler*, 729 F.2d 925 (3d Cir. 1984). *Patterson*'s principal holding is that a decision of a state court concerning the voluntariness of a waiver of *Miranda* rights is

> right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

entitled to the "presumption of correctness." Writing for the court, Judge Sloviter analyzed four recent Supreme Court decisions emphasizing the great deference due to state court factual findings in habeas corpus proceedings. *See Rushen v. Spain*, ___ U.S. ___, 104 S. Ct. 453 (1983) (biased nature of jury deliberations is a finding of fact; presumption of correctness applies); *Maggio v. Fulford*, ___ U.S. ___, 103 S. Ct. 2261 (1983) (presumption applies to competence to stand trial); *Marshall v. Lonberger*, 459 U.S. 422 (1983) (presumption applies to voluntariness of a guilty plea); *Sumner v. Mata*, 455 U.S. 591 (1982) (presumption applies to state of mind of witness in pre-trial photographic identification). On the basis of these cases, Judge Sloviter concluded that, contrary to our prior holdings,[8] "mixed questions of law and fact" such as whether a confession is voluntary or not are subject to the presumption of correctness contained in 28 U.S.C. § 2254(d).

Neither *Patterson* nor the recent Supreme Court decisions hold that we have lost our plenary power to review questions of federal law. Instead, the Court has mandated that we treat state-court factual findings dealing with a defendant's state of mind as such, and apply the presumption of correctness, even where that finding may be dispositive as a matter of law of the defendant's claim. Section 2254(d), of course, contains exceptions, the most important of which is that the presumption does not apply unless the factual findings are fairly supported by the record. *See* 28 U.S.C. § 2254(d). Thus, as we read *Patterson* and the recent Supreme Court cases which it interprets, our review is limited to determining whether the state court applied

8. See United States ex. rel. Haywood v. Johnson, 508 F.2d 322 (3d Cir.), cert. denied, 422 U.S. 808 (1975); United States ex. rel. Rush v. Ziegele, 474 F.2d 1356, 1358-59 (3d Cir. 1973).

the proper legal test, and whether the factual conclusions reached by the state court are supported on the record as a whole;[9] to the extent that our prior holdings gave us plenary review over state court findings as to state-of-mind, they are no longer valid.

The dissent complains bitterly that our opinion, which is, of course, informed by *Patterson*, reads recent decisions of the Supreme Court as effectively overruling, *sub silento*, fifty years of caselaw of that Court holding that the question whether a defendant's state of mind renders his confession involuntary is a question of law, over which we have plenary review in a habeas corpus case. The dissent may be correct on this point. *Patterson* is binding precedent, however, and we must apply it unless we find it distinguishable, which we do not.[10] We note, that *Patterson*'s reading of the trend of the recent Supreme Court decisions has since been reinforced by the Court in *Patton v. Yount*, ___

9. As noted above, the first seven exceptions of § 2254(d), which go to the procedural adequacy of the state proceedings, are not at issue in this case.

10. The dissent points to several "distinctions" between the voluntariness of *Miranda* waivers, the subject matter of *Patterson*, and the voluntariness of confessions, but they are distinctions without a significant difference. Although a *Miranda* waiver itself is not exculpatory, any subsequent confession is likely to be, as to evidence by this case, and the problem of ascertaining the defendant's state of mind are likely to be identical whether the "voluntariness" challenge is to the *Miranda* waiver or to the confession itself. It is doubtless for this reason that the *Patterson* panel encompassed confessions within its holding.

To the extent that the dissent is arguing that *Patterson* was incorrectly decided, it is arguing an issue that is not before us, but that may only be decided by this Court in banc or by the Supreme Court. *See* Third Circuit Internal Operating Procedures Ch. VIII(C).

U.S. ___, 52 U.S.L.W. 4896, 4899 n.12 (1984).[11] At all events, we believe that *Patterson* was correctly decided and that its principles are applicable to voluntary confession cases.[12]

The concept of voluntariness is not one that lends itself to easy description. In determining whether a confession is voluntary, a court must make three determinations. First, the court must find the subsidiary facts on which the ultimate conclusion must be based -- the circumstances surrounding the defendant's confession. Second, the court must draw an inference as to the effect that those surrounding circumstances had on the defendant's mental processes. Third, the court must determine whether the mental processes which led the defendant to confess were such that the confession was "voluntary" within the constitutional standard. *See Culombe v. Connecticut*, 367 U.S. 568, 603 (1961). The dissent does not dispute that, in reviewing a finding of

11. The dissent argues that *Patton* supports its position, relying on the fact that the Court in *Patton* listed a number of factors which favor deference to the trial court on the issue involved in that case: juror bias. The question before us, however, is not the wisdom of section 2254(d); it is, instead, whether the question of a defendant's state of mind at the time of his confession is a question of fact, or a "mixed question of law and fact." In *Patton*, which also required the application of a legal standard to an individual's state of mind, the Court held that the question of the juror's "state of mind" was a question of fact, on which the state court was entitled to deference. A similar inquiry is present in a voluntary confession case, and section 2254(d) is similarly applicable to the inference drawn by the state court concerning the defendant's state of mind.

12. The extended discussion that follows is respective to the dissent. *Patterson* was a unanimous decision and there was no occasion for such comment.

voluntariness, we must defer as to the state court's findings of the subsidiary facts, such as the circumstances of the questioning and the defendant's mental capacities, as long as they are supported by the evidence. There is also no dispute that we are free to review, on a plenary basis, the legal standard applied to the "state of mind" inference drawn by the state court. The disputed question in this case is whether the inference as to the defendant's state of mind should be treated as a separate factual conclusion, to which we must also defer, or whether it is so inextricably bound up with the legal standard that the two steps are really one, over which we have plenary review.[13]

In the long series of cases cited by the dissent, the Supreme Court confronted confessions made under varying circumstances. These cases generally presented undisputed facts, including unrecorded interrogation of the defendant by police officers, long periods of questioning during which the defendant was denied sleep, access to counsel, or any other form of outside support, and often included disputes over whether physical force was used. The Court was consistently dubious that a confession given under these circumstances could be considered "voluntary"; yet state judges and juries were finding, on the basis of these facts, that confessions were voluntary. A precise legal definition of voluntariness, however, remained elusive. As a result, the Court engaged in an

13. The question of the degree of deference to be given by a federal court to state-court determinations of subsidiary facts in a habeas case is not at issue in this case. The issue, rather, is what is a "fact" for purposes of review. The distinction raised by the dissent between direct appeal cases and *habeas corpus* cases is therefore irrelevant to this case, since the issue of which determinations are "legal" and which are "factual" is the same in both contexts.

independent, case-by-case review of the state courts' conclusions concerning voluntariness, on the basis of the subsidiary facts as found by the state court, and substituted its conclusion for that of the state courts.

The case which perhaps best highlights the Court's approach to this problem is one stressed by the dissent: *Culombe v. Connecticut*, 367 U.S. 568 (1961). In *Culombe*, the Court utilized the same three-stage analysis as we do here, but did not treat state court findings concerning the defendant's state of mind as binding. The court did not, however, base its holding on an unconstrained review of the state-of-mind finding. This is clear from a passage from Justice Frankfurter's opinion in *Culombe* which immediately follows the segments quoted by the dissent:

> Great weight, of course, is to be accorded to the inferences which are drawn by the state courts. In a dubious case, it is appropriate with due regard to federal-state relations, that the state court's determination should control. But where on the uncontested external happenings, coercive forces set in motion by state law enforcement officials are unmistakably in action; where these forces, under all the prevailing states of stress, are powerful enough to draw forth a confession; where, in fact, the confession does come forth and is claimed by the defendant to have been extorted from him; and where he has acted as a man would act who is subjected to such an extracting process -- where this is all that appears in the record -- a State's judgment that the confession was voluntary cannot stand.

367 U.S. at 605. Fairly speaking, the "inference" concerning the defendant's state of mind, therefore,

was never considered a purely "legal" question; rather, it was viewed as a hybrid question, on which the state court's conclusion was entitled to some deference."

In recent years, the Supreme Court has shown considerable concern for segregating "factual" and "legal" issues for purposes of appellate review. *See Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982) ("ultimate" findings of fact, which are dispositive of the legal issues involved, are entitled to deference under the "clearly erroneous" standard of Fed. R. Civ. P. 52(a)).[14] The cases relied on by this court in *Patterson* extend that concern to habeas corpus review of state court criminal convictions. *See also Patton v. Yount*, ___ U.S. ___, 52 U.S.L.W. 4896 (1984). *Patterson* found this trend generally applicable to constitutional questions that turn on a determination about a defendant's state of mind, and held that such determinations were ultimate questions of fact, rather than questions of law. We read the recent decisions of the Supreme Court, as interpreted by

14. As pointed out in footnote 8 of the dissent, statements in some of the Supreme Court confession cases that the Court would not be bound by factual findings dispositive of the federal issues are "overstatements." If any of the earlier cases were dependent on such reconsiderations of factual conclusions, those cases have been overruled. *See* 28 U.S.C. § 2254(d); Townsend v. Sain, 372 U.S. 293 (1963). *Cf.* Pullman-Standard v. Swint, 456 U.S. 273, 287-88 (1982).

15. The Court has made at least one exception, on policy grounds, to the limitation on appellate review inherent in the *Pullman-Standard* rule. *See* Bose Corp. v. Consumers Union, ___ U.S. ___, 104 S.Ct. 1949 (1984). Judge Gibbons believes that a similar exception to § 2254(d) is implicit in the Supreme Court's treatment of the voluntary confession cases. *See* typescript at 17. We disagree. We believe that the "policies" cited by the dissent can be dealt with within the framework of the ordinary scope of review.

Patterson, as holding that the second stage of the *Culombe* inquiry -- that concerning the inference as to the defendant's state of mind -- should no longer be considered a "legal" or "hybrid" question as it was in *Culombe*, but rather a question of "ultimate fact" in the sense of *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

This increased concern with limiting the scope of review reflects a change of emphasis on the part of the Supreme Court. Before the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court had used the "voluntariness" inquiry as a way to check outrageous interrogation practices by law enforcement agencies. Since *Miranda*, however, voluntariness inquiries have played a far less important role in court supervision of police practices. Before *Miranda*, the courts were frequently presented with confessions extracted by means of the "third degree." Since *Miranda*, however, voluntary confession cases turn more often on factors such as the individual defendant's intelligence and understanding of the proceedings. In these latter cases, state court determination of state of mind will frequently be dispositive, if given deference by the federal courts in habeas corpus proceedings. The Supreme Court clearly understood this in its recent decisions. These cases, therefore, appear to involve a policy decision by the Court to limit the scope of federal supervision of the interrogation process, as long as the police have complied with the prophylactic rules of *Miranda*.[16]

16. In addition, the Court's decision in *Miranda* also served to increase the awareness of constitutional rights on the part of local police officers and state court judges, thereby reducing the number of outrageous cases and the need for federal review.

The dissent misrepresents our position when it says that we hold that *Miranda* compliance affects the scope of review

Notwithstanding the dissent's hyperbole, the case before us today does not present the type of gross abuses of fundamental fairness that characterized many of the voluntariness cases which came before the Court in the years before its decision in *Miranda*. Instead, it is typical of voluntary confession cases in the post-*Miranda* era. There was no secret interrogation in this case; indeed, the entire encounter was tape-recorded. The questioning was not pressed for a long period of time, and Miller was aware of his right to terminate it upon request. He was not denied food or other necessities, nor was he physically abused or threatened. We cannot say, and we doubt that the dissent would assert, that no confession made under the circumstances presented in this case could ever be "voluntary." Instead, we are asked to judge the effect of a particular set of circumstances on a particular defendant. This type of inquiry is one which seems to us to be peculiarly within the proper realm of the trier of fact.

We recognize that, in circumstances where the ultimate question of fact is one involving state of mind, it may be difficult to pinpoint the "factual" conclusion

in a habeas case over a state court determination about a defendant's state of mind. Our *Miranda* reference should rather be understood as an effort to explain the shift in the law. We add to this historical comment the assertion that, at the same time as *Miranda* was taking care of the worst abuses of police authority, the Court was becoming increasingly concerned with the explosion in the workload of the federal courts, particularly the appellate courts, and with the proper allocation of functions between the state and federal courts. E.g., Parratt v. Taylor, 451 U.S. 527 (1981). Given these developments, the Court has sought to limit the federal role in defining constitutional standards and dictated that we defer to state courts in applying these standards where these applications are reasonable.

as to state of mind, and to state the "legal standard" in such a way as to make its application mechanistic. Under such circumstances, federal courts in habeas corpus cases must either review underlying conclusions about the defendant's state of mind as legal questions, or allow the fact-finding courts some leeway in applying legal standards to the facts of specific cases. Our reading of the recent Supreme Court decisions relied on in *Patterson* is that the Court has chosen to require strict adherence to the limited scope of review over facts, even where it would result in giving state trial courts some leeway in applying the constitutional standard.

Our decision does not leave the federal courts devoid of power to redress state court decisions which violate fundamental constitutional rights. The legal standard to be applied is a federal question. State courts must apply the federal constitution as it is interpreted by the federal courts, and they may not draw inferences as to a defendant's state of mind that are not supported by objective facts. But where, as here, the objective facts support a factual inference that the defendant's "state of mind" was such that the confession was voluntary within the meaning of the Constitution, it is not the role of the federal courts to second-guess the inference drawn by the state courts.

III. *THE VOLUNTARINESS OF THE CONFESSION*

The constitutional test for voluntariness involves a determination, on the totality of the circumstances, whether the confession was a product of the defendant's free will, or whether it was the product of interrogation which resulted in the overbearing of the defendant's will. *Schneckloth v. Bustamont*, 412 U.S. 218 (1973). In most instances, the controlling question is the defendant's state of mind -- a question of fact. In

this case, the New Jersey Supreme Court[17] stated a number of subsidiary factual conclusions: that Miller was a man of reasonable intelligence who had experience with and understood the workings of the criminal justice system; that Miller's distress during the interview was a product of his realization of what he had done, not of coercive pressure by Boyce; that Miller was not deceived into believing that Boyce was anything other than a police officer investigating a serious crime for which Miller was the prime suspect; and, that Miller was well aware that, if he confessed, he would be handled through the criminal justice system. The court then concluded, on the basis of these findings, that Miller's confession was the product of his free will, rather than psychological coercion. 76 N.J. at 404, 388 A.2d at 224. Under § 2254(d), these conclusions are presumed to be correct, and we must accept them as long as they are fairly supported by the record as a whole. We find that they are.

The most relevant part of the record in this case is the tape of Miller's interrogation and confession, and we must therefore analyze the confession tape to determine whether it supports the conclusion of the New Jersey Supreme Court. No objection is made to Boyce's confronting Miller with discrepancies in his explanation of where he was at the time of the murder, or with the statements of the victim's brothers describing the car that approached their home that

17. The fact that the facts found in this case are taken from the opinion of the New Jersey Supreme Court, rather than from a statement of findings by the trial court, does not vitiate the presumption of correctness. *See Tinsley v. Florstedt*, 424 U.S. 448, 461 (1976); *Hance v. Zant*, 696 F.2d 940, 946 (11th Cir.), *cert. denied*, ___ U.S. ___, 103 S. Ct. 3544 (1983); *United States ex rel. Herald v. Franzen*, 667 F.2d 610 (7th Cir. 1981).

morning and its driver. During the questioning, Boyce did lie in telling Miller that the victim had died only a few minutes beforehand, but this lie does not render the confession legally involuntary unless it undermined the "voluntariness" of the confession under the totality of the circumstances. *See Frazier v. Cupp*, 394 U.S. 731, 739 (1969). Since the colloquy about the time of the victim's death did not seem to affect Miller at all, it cannot be said to have undermined the voluntariness of the confession. Obviously, the fact that the interrogation was "sympathetic" rather than confrontational does not render it coercive. Similarly, to the extent that Boyce confronted Miller with the enormity of his crime, attempting to appeal to his conscience, the questioning is not objectionable, even though Boyce referred to the incident as a "problem" rather than a crime.

Miller's principal contention is that Boyce's repeated assertions that Miller did not have "a criminal mind," and that he needed help, rather than punishment, amounted to deception or psychological coercion which undermined the voluntariness of the confession. It is axiomatic that coercion need not be physical to render the confession involuntary; any coercion which denies the defendant the freedom to remain silent may be enough. *See Garrity v. New Jersey*, 385 U.S. 493, 496 (1967). Psychological coercion is enough if, under the totality of the circumstances, it results in the overbearing of the defendant's will. All police practices that encourage defendants to confess, however, do not amount to psychological coercion. Our role is to review the nature of the questioning involved, accepting as true those findings of the state court that involve the defendant's state of mind, to determine whether the tactics used by Detective Boyce in this case were unconstitutionally coercive.

The most substantial potential problem with the confession is that Boyce's questioning arguably implied that Miller would receive "help," not punishment, if he confessed.[18] The use of promises by an interrogating officer can be sufficient to invalidate a confession. *See Robinson v. Smith*, 451 F. Supp. 1278, 1290 (W.D.N.Y. 1978), and cases cited therein. In general, however, promises by interrogators will not invalidate a confession unless they are sufficient to "overbear the defendant's will" -- the general standard of voluntariness. *See Fernandez-Delgado v. United States*, 368 F.2d 34 (9th Cir. 1966) (where defendant was told that any assistance to investigators would be brought to the attention of prosecutors, confession was not rendered inadmissible as a result); *United States v. Ferrara*, 377 F.2d 16 (2d Cir.), *cert. denied*, 389 U.S. 908 (1967) (where interrogator told defendant that if he cooperated with the government, he would be released on a reduced bail, the confession was not rendered involuntary); *United States v. Glasgow*, 451 F.2d 557 (9th Cir. 1971) (per curiam) (where interrogator told defendant he would inform prosecutor if defendant cooperated, the confession was not necessarily rendered involuntary).[19]

18. Boyce never explicitly promised to do anything other than "do all I can with the psychiatrist and everything . . ." In context, this statement apparently refers to a discussion, moments earlier, of the lack of proper psychiatric treatment under Miller's parole for a prior crime.

19. Appellant relies on the venerable case of Bram v. United States, 168 U.S. 532, 542-43 (1897), in which the court stated that a confession is involuntary if "obtained by any direct or implied promise, however slight." As the Second Circuit has stated, "[t]hat language has never been applied with the wooden literalness urged upon us by appellant." United States v. Ferrara, 377 F.2d 16, 17 (2d Cir. 1967).

In this case, Miller showed a continuing recognition of the depth of the trouble that he was in and the consequences of telling Boyce the truth. Although Boyce stated that he felt Miller needed help, not imprisonment, this was only part of his approach. He also spoke to Miller about the need to tell the truth to purge his conscience,[20] and continually intermixed his statements about Miller's "problem" with his appeals to conscience. The state court found that this questioning did not overbear Miller's will, and thus did not render the confession involuntary. As we have noted above, we conclude that the state court's determination as to the effect on Miller's state of mind was supported on the record as a whole.

IV. *CONCLUSION*.

Under the caselaw on the question of voluntariness, the inquiry before us is whether the confession was "a product of an essentially free and unconstrained choice by its maker." Judging by this standard, in light of our restricted scope of review, we have concluded that Miller's confession was voluntary and hence admissible.[21] The judgment of the district court will be affirmed.

20. For instance, at page 12 of the typescript, Boyce said:

> B: Frank, listen to me, honest to God, I'm, I'm telling you, Frank, (inaudible). I know, it's going to bother you, Frank, it's going to bother you, it's there, it's not going to go away, it's there, it's right in front of you, Frank. Am I right or wrong?
>
> M: Yeah.

21. Even if our review on this question was plenary, we would reach the same result. We essentially agree with the conclusions of the New Jersey Supreme Court concerning the effect of Boyce's questioning of Miller. *See supra* typescript at 9-10. We also agree that Boyce's questioning technique could, under different circumstances, create

GIBBONS, *Circuit Judge*, dissenting.

This is a tragic case, made so by the grim death of a young woman, by the abrasive, debilitating psychological ploys used to extract a confession of her murder, and by this court's refusal to follow more than fifty Supreme Court precedents holding that the question whether a confession is involuntarily given is a mixed question of law and fact, over which our review of the ultimate question of voluntariness is for error of law. The majority's holding places us in conflict with eight Federal Circuits. Our decision is all the more disconcerting because, as a matter of law, the confession of the defendant, Frank Miller, was involuntarily obtained. By reclassifying the issue as one of "fact" and deferring to the "factual" findings of the state courts – findings those courts neither made nor purported to make – the majority has abdicated its judicial responsibility to make an independent determination of the voluntariness of a confession. And as a crowning irony to this court's decision, a majority of the eleven New Jersey judges who reviewed this confession, and to whom we are deferring, concluded not that it was voluntary but that it was involuntary; and all eleven judges asserted that they were drawing a legal conclusion. I emphatically dissent.

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risks of deception. The same questioning coming from, for example, a psychiatrist employed by the police but not clearly identified as a detective, might well create a situation in which the confession would not be voluntary. *See* Leyra v. Denno, 347 U.S. 556 (1954) (confession made to a psychiatrist, following three days of prior questioning by police, where psychiatrist was not identified as a police interrogator, was not voluntary). Similarly, if Boyce's questioning had in fact induced Miller to confess in the belief that he would receive psychological "help" rather than punishment, the confession would not be "voluntary."

I.

The confession at issue here was the product of implied promises, trickery, cajolery, dissembling, and exaggeration. Because a complete transcript and tape recording of the interrogation are in the record, none of the historical facts concerning Miller's confession are in dispute. The majority's abridged account of Detective Boyce's questioning conveys neither the deceipt employed by nor the intensity of the interrogation.

Early in the interrogation Detective Boyce led Miller to believe that Miller had been identified at the scene of the crime. "[W]e have a physical description," Boyce asserted, that "fits you and the clothes you were wearing." App. at 7. Later Boyce told Miller, "[Y]ou were identified as being there talking to her minutes before she was . . . [murdered]." App. at 9. In fact Boyce had no such identification. The witness, Daniel Margolin, testified:

> I didn't pay very much attention to the person [driving the car] because I assumed it was someone in the neighborhood and all I really noticed about the individual was he looked about average, he looked like a factory worker and that he had loose-fitting clothing on.

Tr. at 169-70. No identification of Miller was ever introduced at trial. Nevertheless, unaware of Boyce's misrepresentation during the interrogation, Miller responded, "[L]ike you say, I'm identified and my car's identified." App. at 8.

Boyce also represented that blood stains of Deborah Margolin, the victim, were found on Miller's doorstep. "We went to your house last night and found blood stains on the front stoop," Boyce dissembled. App. at 6. In fact the state introduced no [illegible]

at trial and does not contend on appeal that any such blood existed.

Nor did the interrogation stop with these fabrications. Miller had been detained in the Flemington State Police Barracks kitchen for two hours before his interrogation. In pretrial proceedings Miller testified that during this detention, Officer Scott "told me that a girl had been cut but that she was lucky she was still alive and was going to be able to identify the guy that done it." Tr. at 109. Scott's assertion was false; although both officers knew that Margolin had died five hours earlier, they deliberately left the impression that she had given a description and could identify her assailant. Alluding to Scott's remark that Margolin "was in the hospital," App. at 9, Miller asked his interrogator whether Margolin was still alive. App. at 8. Boyce quickly ad-libbed, "She died just a few minutes ago. I just got . . . that's what that [telephone] call was about.[1] App. at 9.[1] In fact Margolin had died hours earlier leaving no description of her assailant.

These prevarications were followed by thirty-eight minutes of intensive, relentless questioning during which Boyce plainly and simply overbore the defendant's will. Boyce badgered Miller incessantly

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1. The tape recording of the interrogation reveals that a telephone rang shortly before Miller asked whether Margolin had died. Boyce quickly fabricated a story that the caller informed him that Margolin had died moments earlier.

In pretrial testimony Scott asserted that he did not "discuss any aspect of the murder of Miss Deborah Margolin" in the Barracks kitchen. Tr. at 58. In light of Miller's contemporary allusion on the tape to Scott's remark that Margolin "was in the hospital," this testimony was not credible. The trial court found only that Miller "was not interrogated" during this period. Tr. at 145, a finding not inconsistent with the fact that Scott remarked to Miller that Margolin was in the hospital when the interrogation began. *See* Rhode Island v. Innis, 446 U.S. 291, 299-303 (1980).

with promises of help if Miller would confess. On no less than 41 occasions Boyce urged that Miller admit he had a problem, that he needed help to solve his problem, and that Boyce would provide that help if Miller would confess. App. at 6-17 *passim*. "If I promise to, you know, do all I can with the psychiatrist and everything, and we get the proper help for you, . . . will you talk to me about it?" whispered Boyce. App. at 12. "[W]e're going to see to it that you get the proper help. This is our job, Frank. This is our job. This is what I want to do," Boyce intoned. App. at 15. On at least 12 other occasions Boyce urged that Miller would not be held responsible for his actions. "[I]t's not your fault, it's their fault," said Boyce. App. at 11. "[I]f you did commit an act, actually they're the ones that are to blame, in my eyes, . . . not you as an individual." *Id.* "[I]t may have been an accident," Boyce entreated. "It may be something that, that you did that you can't be held accountable for." App. at 15. The tape reveals Miller sobbing thirty minutes into the interrogation, distraught, weak, and unstable.

As if there could be any doubt about the intensity of this debilitating examination, at the conclusion of Boyce's interrogation Miller lapsed into unconsciousness. The majority glosses over the fact that Miller passed out on the floor at the end of the questioning as though this were the ordinary response of one in control of his will during an interrogation. In fact Miller's unconscious state prevented the officers from obtaining any signed confession. Detective Boyce testified:

> Q. I gather that [a] statement was never taken, is that right?
>
> A. It was not.
>
> Q. Why was that, Officer?

A. Momentarily after terminating this particular interview Mr. Miller went into as I can best define it a state of shock.

Q. What do you mean by that, sir?

A. He was sitting on a chair -- . . .

Mr. Miller had been sitting on a chair, had slid off of the chair on to the floor maintaining a blank stare on his face, staring straight ahead and we were unable to get any type of verbal response from him at that time.

Q. As I understand it he was then removed to the Hunterton Medical Center, is that right?

A. Yes, the first aid squad was contacted immediately.

Tr. at 84-85.

In a unanimous, strongly worded opinion, the New Jersey Appellate Division condemned these adjurations as "relentless and successful Svengalian efforts." *State v. Miller*, 76 N.J. 392, 419, 388 A.2d 218, 232 (1978) (Conford, P.J.A.D., dissenting).[2] Without dissent the court held that Miller "could not long resist the tremendous psychological pressure." *Id.* "The tape transcript must be read in its entirety for its full aroma to be savored," that court observed. *Id.* at 413, 388 A.2d at 229. Miller's ultimate confession, the court held, was a "capitulation to the superior mind." *Id.* at 422, 388 A.2d at 234. And capitulation it was. Miller was tricked by an intensive, hypnotic 58-minute interrogation into incriminating himself by a superior questioner who played on Miller's unstable, childlike mind.

2. The opinion of the Appellate Division is reproduced in substantial part in Judge Conford's dissent, to which the citations in this opinion refer.

II.

After reviewing these events, the New Jersey Appellate Division held:

> An overbearing broadside which results in a confession by virtue of intense and mind bending psychological compulsion deserves no better fate at our hands than does the legendary rubber hose. *Chambers v. Florida*, 309 U.S. 227 (1940). We have long cherished a determination that the fair winds of due process shall blow upon the guilty as well as the innocent. We will not here let our gratitude for good police work which ferreted out one who is most probably a murderer, and our abhorrence at the crime he committed, cause us to abandon basic constitutional principles.

76 N.J. at 422-23, 388 A.2d at 234. Without applying these constitutional principles, indeed without referring to them, the majority today characterizes the voluntariness of Miller's confession as a question of "fact." The "factual" finding of the New Jersey Supreme Court, the majority concludes -- a finding that court never made, for the New Jersey Supreme Court held that it was deciding a question of law -- is not without support in the record. Consequently, the majority reasons, we must defer to the state courts' "finding" that Miller's confession was voluntary.

This disposition is squarely in conflict with Supreme Court precedent. Over fifty Supreme Court decisions have held that the voluntariness of a confession is a mixed question of law and fact over which our review of the ultimate question of voluntariness is plenary.[3] Indeed, no issue has

3. The Supreme Court has reversed convictions predicated on confessions held involuntary as a matter of law on 31 occasions. Brown v. Mississippi, 297 U.S. 278 (1936); Chambers v. Florida,

consumed the attention of the Supreme Court more completely in this century, no single question has been investigated more thoroughly nor dissected more vigorously, than the standards for the voluntariness of a confession. The most recent of these decisions, decided barely a month after the New Jersey Supreme Court's decision in this case, reiterated what has become rote in the Court's jurisprudence: a confession is voluntary only if it is "'the product of a rational

309 U.S. 227 (1940); Canty v. Alabama, 309 U.S. 629 (1940) (per curiam) (sumary reversal on authority of *Chambers*); White v. Texas, 310 U.S. 530 (1940) (on petition for rehearing after summary reversal); Lomax v. Texas, 313 U.S. 544 (1941) (per curiam) (summary reversal on authority of *Chambers* and *White*); Vernon v. Alabama, 313 U.S. 547 (1941) (per curiam) (same); Ward v. Texas, 316 U.S. 547 (1942); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Malinski v. New York, 324 U.S. 401 (1945); Haley v. Ohio, 332 U.S. 596 (1948); Watts v. Indiana, 338 U.S. 49 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Harris v. South Carolina, 338 U.S. 68 (1949); Johnson v. Pennsylvania, 340 U.S. 881 (1950) (per curiam) (summary reversal on authority of *Turner*); Leyra v. Denno, 347 U.S. 556 (1954); Fikes v. Alabama, 352 U.S. 191 (1957); Payne v. Arkansas, 356 U.S. 560 (1958); Spano v. New York, 360 U.S. 315 (1959); Blackburn v. Alabama, 361 U.S. 199 (1960); Reck v. Pate, 367 U.S. 433 (1961); Culombe v. Connecticut, 367 U.S. 568 (1961); Gallegos v. Colorado, 370 U.S. 49 (1962); Lynumn v. Illinois, 372 U.S. 528 (1963); Haynes v. Washington, 373 U.S. 503 (1963); Davis v. North Carolina, 384 U.S. 737 (1966); Garrity v. New Jersey, 385 U.S. 493 (1967); Clewis v. Texas, 386 U.S. 707 (1967); Beecher v. Alabama, 389 U.S. 35 (1967) (per curiam); Greenwald v. Wisconsin, 390 U.S. 519 (1968) (per curiam); Darwin v. Connecticut, 391 U.S. 346 (1968) (per curiam); Mincey v. Arizona, 437 U.S. 385 (1978).

The Court has sustained convictions predicated on confessions held voluntary as a matter of law on 14 occasions. Lisenba v. California, 314 U.S. 219 (1941); Lyons v. Oklahoma, 322 U.S. 596 (1944); Gallegos v. Nebraska 342 U.S. 55 (1951); Stroble v. California, 343 U.S. 181 (1952); Brown v. Allen, 344 U.S. 443 (1953); Stein v. New York, 346 U.S. 156 (1953); Thomas v. Arizona, 356 U.S. 390 (1958); Ashdown v. Utah, 357 U.S. 426 (1958); Crooker v. California, 357 U.S. 433 (1958); Cicenia v. Lagay, 357 U.S. 504 (1958); Boulden v. Holman, 394 U.S. 478 (1969); Fratter

intellect and a free will,'" and "[i]n making this determination, we are not bound by the [state] [s]upreme [c]ourt's holding that the statements were voluntary. Instead, this Court is under a duty to make an independent evaluation of the record." *Mincey v. Arizona*, 437 U.S. 385, 398 (1978).

The authority for the majority's decision to ignore 48 years of Supreme Court precedent holding that the ultimate issue of voluntariness of a confession is a question of law is the panel opinion of this court in *Patterson v. Cuyler*, 729 F.2d 925 (3d Cir. 1984). Creating a conflict with eight Federal Circuits, *see* note 20 *infra*, *Patterson* reasoned that the voluntariness of a confession is an issue of historical fact.[4] In so

v. Cupp, 394 U.S. 731 (1969); Procunier v. Atchley, 400 U.S. 446 (1971); Hutto v. Ross, 429 U.S. 28 (1976) (per curiam).

In addition, the Supreme Court has addressed several procedural issues pertaining to the determination of voluntariness. In these instances the Court reaffirmed that the ultimate issue of voluntariness of a confession is one of law and remanded for further proceedings. *See* Lee v. Mississippi, 332 U.S. 742, 743-46 (1948) (defendant's denial that confession was made does not estop assertion that it was involuntary); Rogers v. Richmond, 365 U.S. 534, 540-49 (1961) (impermissible to rely on reliability of confession as evidence of voluntariness); Townsend v. Sain, 372 U.S. 293, 307-09 (1963) (circumstances under which evidentiary hearing must be held in habeas corpus proceedings); Jackson v. Denno, 378 U.S. 368, 376-91 (1964) (trial court must make initial determination of voluntariness before submission to jury); Boles v. Stevenson, 379 U.S. 43, 44-46 (1964) (per curiam) (same as *Jackson*); Sims v. Georgia, 385 U.S. 538, 541-44 (1967) (same; trial court's conclusion of voluntariness "must appear from the record with unmistakable clarity"); Lego v. Twomey, 404 U.S. 477, 482-89 (1972) (voluntariness in *Jackson v. Denno* hearing need be established only by preponderance of evidence).

4. Language in *Patterson* might be read to hold that voluntariness of a confession is a mixed question of law and fact, and that such mixed questions are subject to the presumption of correctness of

reasoning, the Patterson court concluded that no less than fifty Supreme Court decisions have been overruled *sub silentio*, a *coup muet* said to be the work of three recent decisions of the Supreme Court.[4a] None of the recent opinions examined in *Patterson* addresses the voluntariness of a confession. The *Patterson* court mentioned none of the fifty confession cases which it reasoned were overruled *sub silentio* or discussed the motive and purpose behind the Supreme Court's classification of voluntariness of a confession as a mixed question of law and fact. Indeed, *Patterson* itself addresses only the voluntariness of a *Miranda* waiver. No petition for rehearing in *Patterson* was filed.

I dissent from the majority's roughshod treatment of almost half a century of Supreme Court precedent. The history of the voluntary-confession doctrine makes it abundantly clear that the ultimate issue of voluntariness of a confession is a question of law. *See* Part III *infra*. Moreover, I dissent from the majority's deference to a finding of "fact" that no New Jersey Court has made. There is no authority for deference to a finding of "fact" when the court rendering such a "finding" has expressly held that it is not making a factual finding but drawing a legal conclusion. *See* Part IV *infra*. We pay little respect for the state courts

28 U.S.C. § 2254(d) (1982). 729 F.2d at 932. This conclusion, however, is contradicted by the Supreme Court's recent decision in Strickland v. Washington, 104 S. Ct. 2052, 2070 (1984). Thus, I read *Patterson* to hold that the voluntariness of a confession is itself an issue of historical fact.

4a. Rushen v. Spain, 104 S. Ct. 453, 456 (1983) (per curiam) (jury bias a question of fact); Maggio v. Fulford, 103 S. Ct. 2261, 2262-64 (1983) (per curiam) (competence to stand trial a question of fact); Marshall v. Lonberger, 103 S. Ct. 843, 849 (1983) (ultimate question of voluntariness of guilty plea an issue of law). *Rushen* and *Maggio* were per curiam summary reversals decided without briefing or argument.

by ignoring their holdings and rewriting their factual findings. Finally, I dissent from the majority's suggestion that three recent Supreme Court decisions have overruled *sub silentio* one of the most firmly grounded of Supreme Court doctrines. One of these decisions, holding that the ultimate issue of voluntariness of a guilty plea is a question of law, undermines the majority's position. Neither of the remaining decisions pertains to custodial interrogation conducted in closed proceedings. The import and force of the voluntary-confession doctrine, in contrast, is to afford independent federal review over these closed proceedings. *See* Part III D *infra*. The majority's decision today raises deeply disturbing questions concerning respect for *stare decisis* and regarding the appropriate role of the inferior federal courts in our hierarchical legal structure.

III.

Ultimate Issue of Voluntariness of a Confession is a Question of Law

A. The Direct-Appeal Doctrine

The Supreme Court held in 1936 that a conviction obtained by means of a confession extracted by violence violates due process of law. *Brown v. Mississippi*, 297 U.S. 278, 286 (1936). The interrogators in *Brown* brazenly admitted their torture. "'This deputy was put on the stand by the state in rebuttal, and admitted the whippings,'" noted Chief Justice Hughes. Asked how severely one of the defendants was whipped, the deputy testified, "'"Not too much for a negro; not as much as I would have done if it were left to me."'" *Id.* at 284. Two others who had participated in the whippings "'were introduced and admitted it,'" the Court observed; "'not a single witness was introduced who denied it.'" *Id.* at 284-85.

Thus no conflict in the trial testimony was presented in *Brown*. The Supreme Court held that on the basis of the facts admitted, "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as a basis for conviction and sentence was a clear denial of due process." *Id.* at 286.

On the Supreme Court's next occasion to address a coerced-confession claim, the interrogators were neither as brazen nor as foolish as those in *Brown*, for none admitted to mistreatment of the defendants. In *Chambers v. Florida*, 309 U.S. 227 (1940), the Florida Supreme Court had twice reversed the convictions of four defendants, directing that a jury decide in *coram nobis* proceedings whether their confessions were "'in fact freely and voluntarily made.'" *Id.* at 227-28 n.2. After a jury twice found the confessions voluntary, Florida's highest court affirmed. The evidence of voluntariness before the Supreme Court consisted of the transcripts of these *coram nobis* proceedings. "The testimony [in these proceedings] is in conflict," noted Justice Black, "as to whether all four petitioners were continually threatened and physically mistreated until they finally, in hopeless desperation and fear of their lives, agreed to confess . . . ." *Id.* at 231.

Before the Supreme Court the State of Florida urged that the jury's finding of voluntariness was a finding of "fact." This "finding," Florida argued, resolved any dispute in the testimony as to voluntariness and "finally determined [that issue] because passed upon by a jury." *Id.* at 228. The Supreme Court rejected this claim. "[W]e must determine independently," the Court held, "whether petitioners' confessions were so obtained, by review of the facts upon which that issue necessarily turns." *Id.* at 229 (footnote omitted). Because certain of the

historical facts were disputed, the Court held, it would decide the voluntariness of the confessions as a matter of law on the basis of the undisputed historical facts. *Id.* at 238-39.

Chambers v. Florida thereby became the progenitor of the Supreme Court's direct-appeal doctrine in voluntary-confession cases. That doctrine provides that in reviewing claims of coerced confession raised on direct appeal to the Supreme Court, the voluntariness of the confession is to be decided as a matter of law on the basis of the admitted or undisputed historical facts of record. The Court applied the direct-appeal doctrine without fail in seventeen voluntary confession cases decided after the *Chambers* decision in 1940 and before the first voluntary-confession claim to reach the Supreme Court by habeas corpus, *Brown v. Allen*, 344 U.S. 443 (1953), in 1953.[5] The Court's 1949 trilogy of confession cases, *Watts v. Indiana*, 338 U.S. 49 (1949); *Turner v. Pennsylvania*, 338 U.S. 62 (1949); *Harris v. South Carolina*, 338 U.S. 68 (1949), state the doctrine clearly:

> On review here of State convictions, all those matters which are usually termed issues of fact are for conclusive determination by the State courts

5 Canty v. Alabama, 309 U.S. 629 (1940) (per curiam); White v. Texas, 310 U.S. 530 (1940); Lomax v. Texas, 313 U.S. 544 (1941) (per curiam); Vernon v. Alabama, 313 U.S. 547 (1941) (per curiam); Lisenba v. California, 314 U.S. 219 (1941); Ward v. Texas, 316 U.S. 547 (1942); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Lyons v. Oklahoma, 322 U.S. 596 (1944); Malinski v. New York, 324 U.S. 401 (1945); Haley v. Ohio, 332 U.S. 596 (1948); Lee v. Mississippi, 332 U.S. 742 (1948); Watts v. Indiana, 338 U.S. 49 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Harris v. South Carolina, 338 U.S. 68 (1949); Johnson v. Pennsylvania, 340 U.S. 881 (1950) (per curiam); Gallegos v. Nebraska, 342 U.S. 55 (1951); Stroble v. California, 343 U.S. 181 (1952).

and are not open for reconsideration by this Court. Observance of this restriction in our review of State courts calls for the utmost scruple. But "issue of fact" is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions and their proper applications, are issues for this Court's adjudication. . . . Especially in cases arising under the Due Process Clause is it important to distinguish between issues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review which this Court sits. . . .

[I]n all the cases that have come here during the last decade from the courts of the various States in which it was claimed that the admission of coerced confessions vitiated convictions for murder [citing fourteen cases], there has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication. Therefore only those elements of the events and circumstances in which a confession was involved that are unquestioned in the State's version of what happened are relevant to the constitutional issue here. *But if force has been applied, this Court does not leave to local determination whether or not the confession was voluntary.* There is torture of mind as well as body; the will is as much affected by fear as by force. And

there comes a point where this Court should not be ignorant as judges of what we know as men.

Watts v. Indiana, 338 U.S. at 50-52 (opinion of Frankfurter, J.) (emphasis added) (footnote and citations omitted).

Indeed, the direct-appeal doctri[illegible]e became so firmly rooted in Supreme Court jurisprudence that reiteration of the oft-repeated standard became second nature to the Court. Thus, after putting "to one side the controverted evidence" in *Haley v. Ohio*, 332 U.S. 596, 597-98 (1948), and noting that both the state trial court and the jury "found" the defendant's confession voluntarily made, *id.* at 599, the Supreme Court held:

> But the ruling of the trial court and the finding of the jury on the voluntary character of the confession do not foreclose the independent examination which it is our duty to make here. . . . If the undisputed evidence suggests that force or coercion was used to exact the confession, we will not permit the judgment of conviction to stand. . . .

Id. (opinion of Douglas, J.). Similarly, in *Gallegos v. Nebraska*, 342 U.S. 55 (1951), the Court held:

> As this Court has been entrusted with power to interpret and apply our Constitution to the protection of the right of an accused to federal due process in state criminal trials, the proper performance of that duty requires us to examine, in cases before us, such undisputed facts as form the basis of a state court's denial of that right. . . . A contrary rule would deny to the Federal Government ultimate authority to redress a violation of constitutional rights. As state courts also are charged with applying constitutional standards of due process, in recognition of their superior opportunity to appraise conflicting

> testimony, we give deference to their conclusions on disputed and essential issues of what actually happened. . . . Its duty compels this Court, however, to decide for itself, on the facts that are undisputed, the constitutional validity of a judgment that denies claimed constitutional rights.

342 U.S. at 61 (opinion of Reed, J.).

The Supreme Court's decision to characterize the ultimate issue of voluntariness of a confession as one of law did not turn on an epistemological theory of whether "voluntariness" concerned the defendant's "state of mind" and whether such "state of mind" issues are questions of "fact." To the contrary, the Court's holdings had a far deeper motivation. The interrogations at issue took place in secret. They generally occurred in inherently coercive settings, frequently involving a single defendant shackled or detained for long periods of time and surrounded or confronted by relays of five or more police officers. At trial the defendant's account was matched against the testimony of many officers, some of it obviously incredulous to the Supreme Court. The Court construed the ultimate question of voluntariness as one of law because the settings of police interrogations were secret and inherently coercive, because the Court had grave doubts about what transpired during these secret proceedings, and because federal review of these proceedings would be frustrated on direct appeal if the question were one of fact. Hence the Court's explanation in both *Haynes v. Washington*, 373 U.S. 503, 515-16 (1963), and *Stein v. New York*, 346 U.S. 156, 181 (1953) -- both coerced-confession cases -- that "this Court cannot allow itself to be completely bound by state court determination of any issue essential to

decision of a claim of federal right, else federal law could be frustrated by distorted fact finding."[6]

The Supreme Court's opinions in *White v. Texas*, 310 U.S. 530 (1940), and *Ward v. Texas*, 316 U.S. 547 (1942), are exemplars of this point. State officers in both cases conceded that they had taken the defendant on "night trips to the woods," "out off of the road," *White*, 310 U.S. at 533, or "by night and day to strange towns," *Ward*, 316 U.S. at 555. They contested, however, what happened on these strange "night trips." The defendants contended that they were "beaten, whipped and burned," *Ward*, 316 U.S. at 551, "handcuffed" and "whipped," *White*, 310 U.S. at 532, and otherwise subject to physical abuse. The interrogating officers, in contrast, denied any mistreatment, avowing instead that the defendants felt a new sense of peace after these night journeys and willingly confessed. The officer's testimony in *Ward v.*

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6. *See also* Irvin v. Dowd, 366 U.S. 717, 723 (1961) (competence of juror to set aside preconceived view of defendant's guilt a mixed question of law and fact); Marshall v. Lonberger, 103 S. Ct. 843, 849 (1983) (voluntariness of guilty plea a question of law).

Of course, the Court overstated its point in *Haynes* and *Stein*. In some circumstances, a state finding on an ultimate issue dispositive of a claim of federal right is treated as a fact. *E.g.*, Rushen v. Spain, 104 S. Ct. 453, 456 (1983) (per curiam) (jury bias); Maggio v. Fulford, 103 S. Ct. 2261, 2262-64 (1983) (per curiam) (competence to stand trial); *cf.* Pullman-Standard v. Swint, 456 U.S. 273, 287-88 (1982) (federal district court finding of discriminatory intent treated as fact). Each issue must be analyzed independently with an eye for the policies and considerations relevant to classification as a question of fact or law. In the case of voluntary confessions, those considerations were that police interrogations were conducted in secret, inherently coercive atmospheres, raising grave questions about what transpired during these proceedings. The Supreme Court feared time and again that claims of federal right would be defeated were the issue classified as one of fact.

Texas is illustrative: "We just talked to him to get that statement. Yes, sir, we just sweet talked him out of it.'" 316 U.S. at 552. The Texas courts resolved the disputed testimony in favor of the officers and purported to "find" the confessions voluntary. In order to prevent gross miscarriages of justice, the Supreme Court held while state findings of historical fact were binding on direct appeal, the ultimate issue of voluntariness is one of law.

In summary, by 1953 the Supreme Court had expressly held in at least eighteen reported cases that the ultimate question of the voluntariness of a confession is one of law. On direct appeal to the Supreme Court this legal determination was to be made on the basis of the undisputed historical facts. The Court characterized the ultimate issue as one of law because the police interrogations at issue were conducted in secret, coercive settings, and because federal review over these proceedings would be defeated on direct appeal were the ultimate issue one of fact.

B. Habeas Corpus Review

In 1953 the Supreme Court examined the first coerced-confession claim to reach the Court in habeas corpus, *Brown v. Allen*, 344 U.S. 443 (1953).[7] In what is now standard fare to students of habeas corpus, the Court held in *Brown v. Allen* that the scope of review of the federal courts in habeas corpus exceeds that of the Supreme Court on direct appeal. While the direct-appeal doctrine limits the Supreme Court's review to the undisputed facts of record, the 1867 Habeas Corpus Act[8] creates the power in every case to

7. *Brown v. Allen* involved three consolidated habeas petitions challenging methods of jury selection on equal protection grounds. The petitioner in *Brown* itself also challenged the admission of an allegedly coerced confession. 344 U.S. at 474-76.

readjudicate issues of historical fact decided by the state courts. 344 U.S. at 457-64 (opinion of Reed, J.). Moreover, the Court held, in certain circumstances the federal courts were obliged to consider factual questions anew, in particular when the state courts failed to give "fair consideration to the issues and the offered evidence," *id.* at 463 (opinion of Reed, J.), and when "a vital flaw be found in the process of ascertaining" the facts by the state courts. 344 U.S. at 506 (opinion of Frankfurter, J.). However, the *Brown* Court held, conclusions of mixed law and fact are never binding in habeas corpus proceedings:

> Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts, . . . the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.

Id. at 507 (opinion of Frankfurter, J.). The Court's review of the coerced-confession claim in *Brown* -- a mixed question of law and fact -- was plenary. 344 U.S. at 474-76 (opinion of Reed, J.).

The "fair consideration" and "vital flaw" standards of *Brown v. Allen* soon proved bedevilling to the district courts.[9] In an effort to afford additional guidance on the question whether the district courts were obliged to relitigate issues of historical fact, the Supreme Court in *Townsend v. Sain*, 372 U.S. 293 (1963), refined the rules of *Brown v. Allen*. In lieu of

9. *See* Townsend v. Sain, 372 U.S. 293, 310 & n.8 (1963) ("It has become apparent that the opinions in *Brown v. Allen*, *supra*, do not provide answers for all aspects of the hearing problem for the lower federal courts, which have reached widely divergent, in fact often irreconcilable, results").

the amorphous "fair consideration" and "vital flaw" standards of *Brown*, the Court substituted six arguably clearer standards.[10] In the event that a mandatory hearing is not required under these standards, the *Townsend* Court held, the district courts "may, and ordinarily should, accept the facts as found in the [state] hearing, [but (they) need not." 372 U.S. at 318.

Congress codified the *Townsend* standards with little change in the 1966 amendments to the Habeas Corpus Act. 28 U.S.C. § 2254(d)(1)-(8) (1982); *see* Maj. op., Typescript op. at 11 n.7. The 1966 amendments retained the exception applicable when the state factual determination "is not fairly supported by the record." 28 U.S.C. § 2254(d)(8) (1982). In cases not falling within these exceptions, Congress added, state findings of historical fact "shall be presumed to be correct." 28 U.S.C. § 2254(d) (1982).

Neither *Townsend v. Sain* nor the 1966 amendments to the Habeas Corpus Act, however, altered the Supreme Court's doctrine that the federal courts sitting in habeas proceedings exercise plenary review over the ultimate legal issue in mixed questions of law and fact. The *Townsend* Court held:

10. *See* 372 U.S. at 313:

> We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

> By "issues of fact" we mean to refer to what are termed basic, primary, or historical facts: facts "in the sense of a recital of external events and the credibility of their narrators . . . ." *Brown v. Allen*, 344 U.S. 443, 506 [(1953)] (opinion of Mr. Justice Frankfurter). So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense.

372 U.S. at 309 n.6. As recently as May of 1984 the Court reaffirmed that the ultimate legal issue in a mixed question of law and fact is not subject to the presumption of correctness of section 2254(d). *Strickland v. Washington*, 104 S. Ct. 2052, 2070 (1984); *see Marshall v. Lonberger*, 103 S. Ct. 843, 849 (1983); *Sumner v. Mata*, 455 U.S. 591, 597 (1982) (per curiam); *Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980); *Brewer v. Williams*, 430 U.S. 387, 403-04 (1977).

Nor did the Court recede from its holdings that the voluntariness of a confession is such a mixed question of law and fact. As I note below, in over thirty decisions filed between the opinions in *Brown v. Allen* and *Sumner v. Mata*, the Supreme Court emphatically reaffirmed that voluntary-confession determinations are mixed questions of law and fact.

Thus, the evolving standards for the review of historical facts in habeas corpus proceedings had no effect on the voluntary-confession doctrine. That doctrine applied equally in direct appeals and habeas corpus, and held that the ultimate question of the voluntariness of a confession is an issue of law.

C. Coerced-Confession Claims from Brown v. Allen *to* Mincey v. Arizona

As increasing numbers of coerced-confession claims pressed for the Supreme Court's attention, the Court evinced mounting concern over the

circumstances of police interrogations conducted in closed-door sessions. Between 1953 and 1966, the year of *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court addressed no less than nineteen coerced-confession claims. During this period the Court reaffirmed that a confession may be extracted by psychological ploys as surely as by physical abuse. *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960);[11] *see Jackson v. Denno*, 378 U.S. 368, 389-90 (1964); *Spano v. New York*, 360 U.S. 315, 321 (1959) (as "the methods used to extract confessions [become] more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made."). In all such cases, the Court held, the legal standard for voluntariness is whether the confession is "the product of a rational intellect and a free will." *Blackburn*, 361 U.S. at 208. In the case of psychological coercion, the Court's assessment of voluntariness included consideration of the intensity and potential for deceipt of any psychological pressure employed[12] in addition to the defendant's susceptibility

11. The Court in *Blackburn v. Alabama* held:

> Since *Chambers v. Florida*, 309 U.S. 227 [(1940)], this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of "persuasion." A prolonged interrogation of an accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror.

361 U.S. at 206 (footnote omitted).

12. *See* Lynumn v. Illinois, 372 U.S. 528, 534 (1963) (investigators threaten defendant with loss of children); Spano v. New York, 360 U.S. 315, 321-24 (1961) (police officer, a "childhood friend" of the defendant, stated falsely that job was in jeopardy unless defendant confessed); Leyra v. Denno, 347 U.S. 556, 559-61 (1954) (use of psychiatrist).

to such pressure, as measured by the individual's maturity,[13] education,[14] intelligence,[15] experience,[16] and physical condition.[17]

In each of these cases the Supreme Court reaffirmed that the ultimate determination of voluntariness is a mixed question of law and fact. Justice Frankfurter's encyclopedic opinion in *Culombe v. Connecticut*, 367 U.S. 568 (1961), for example, clearly distinguished between the underlying historical facts and the ultimate determination of voluntariness:

> The inquiry whether, in a particular case, a confession was voluntarily or involuntarily made involves, at the least, a three-phased process. First, there is the business of finding the crude historical facts, the external, "phenomenological" occurrences and events surrounding the confession. Second, because the concept of "voluntariness" is one which concerns a mental

13. *See* Gallegos v. Colorado, 370 U.S. 49, 54 (1962); Payne v. Arkansas, 356 U.S. 560, 567 (1958); Haley v. Ohio, 332 U.S. 596, 599-601 (1948).

14. *See* Clewis v. Texas, 386 U.S. 707, 712 (1967); Davis v. North Carolina, 384 U.S. 737, 742 (1966); Harris v. South Carolina, 338 U.S. 68, 70 (1949).

15. *See* Culombe v. Connecticut, 367 U.S. 568, 630 (1961); Reck v. Pate, 367 U.S. 433, 441 (1961); Fikes v. Alabama, 352 U.S. 191, 193 (1957).

16. *See* Thomas v. Arizona, 356 U.S. 390, 394 (1958); Stein v. New York, 346 U.S. 156, 185-86 (1953); Lisenba v. California, 314 U.S. 219, 233-34 (1941).

17. *See* Townsend v. Sain, 372 U.S. 293, 307-09 (1963) (truth serum); Clewis v. Texas, 386 U.S. 707, 712 (1967).

> state, there is the imaginative reconstruction, largely inferential, of internal, "psychological" fact. Third, there is the application to this psychological fact of standards for judgment informed by the larger legal conceptions ordinarily characterized as rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstances.

367 U.S. at 603 (opinion of Frankfurter, J.). The first of these determinations, the Court held, is one of historical fact. *Id.* However, the Court reiterated, the second and third phases are conclusions of law. *Id.* at 604-05. Justice Frankfurter made amply clear the reason for classifying these determinations as legal conclusions:

> No more restricted scope of review would suffice adequately to protect federal constitutional rights. For the mental state of involuntariness upon which the due process question turns can never be affirmatively established other than circumstantially -- that is, by inference; and it cannot be competent to the trier of fact to preclude our review simply by declining to draw inferences which the historical facts compel.

Id. at 606.

Reaffirmations of the rule that the ultimate question of voluntariness is one of law appear in every case decided during this period. *E.g.*, *Reck v. Pate*, 367 U.S. 433 (1961):

> The question whether there has been a violation of the Due Process Clause of the Fourteenth Amendment by the introduction of an involuntary confession is one which it is the ultimate responsibility of this Court to determine.

Id. at 435; *see also Haynes v. Washington*, 373 U.S. [illegible] (1963):

> Our conclusion is in no way foreclosed, as the State contends, by the fact that the state trial judge or the jury may have reached a different result on this issue.
>
> It is well settled that the duty of constitutional adjudication resting upon this Court requires that the question whether the Due Process Clause of the Fourteenth Amendment has been violated by admission into evidence of a coerced confession be the subject of an independent determination here . . . ; "we cannot escape the responsibility of making our own examination of the record," *Spano v. New York*, 360 U.S. 315, 316 [(1959)].

Id. at 515 (emphasis in original).

The Supreme Court's concern for the conduct of secret police interrogation reached a new level of acuity with the Court's incorporation of the privilege against self-incrimination as an element of due process applicable to the states through the fourteenth amendment. *Malloy v. Hogan*, 378 U.S. 1, 6-11 (1964). That concern, in turn, led to the Court's well-known decisions in *Massiah v. United States*, 377 U.S. 201 (1964), and *Escobedo v. Illinois*, 378 U.S. 478 (1964) -- pressing the sixth amendment right to counsel into service to protect the privilege against self-incrimination after the onset of adversary judicial proceedings, and before their onset in the circumstances defined in *Escobedo*[18] -- and *Miranda v.*

18. *See* 378 U.S. at 490-91:

> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect

Arizona, 384 U.S. 436 (1966), requiring the recitation of warnings after the onset of custodial interrogation to enforce the privilege against self-incrimination.

The advent of these decisions enforcing the newly incorporated privilege against self-incrimination, however, did not change the Supreme Court's solicitude for scrutiny of confessions exacted by coercion. In 1978 the Court again affirmed that the ultimate question of the voluntariness of a confession is one of law. *Mincey v. Arizona*, 437 U.S. 385 (1978):

> If, therefore, Mincey's statements to Detective Hust were not "'the product of a rational intellect and a free will,'" *Townsend v. Sain*, 372 U.S. 293, 307 [(1963)], quoting *Blackburn v. Alabama*, 361 U.S. 199, 208 [(1960)], his conviction cannot stand. In making this critical determination, *we are not bound by the Arizona Supreme Court's holding that the statements were voluntary. Instead, this Court is under a duty to make an independent evaluation of the record.*

Id. at 398 (emphasis added). The majority now reasons that *Mincey v. Arizona*, and each of its direct-appeal predecessors, are now overruled.

It is important to understand the reason for this conclusion and the significance of its ramifications. As the majority properly notes, there is no distinction between the definition of "fact" for purposes of direct appeal and habeas corpus. Maj. op., Typescript op. at 16 n.12. Had the voluntariness of Mincey's confession been an ultimate question of fact, the Supreme Court

has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth

would have asked only whether the Arizona courts had applied the proper legal standard -- whether, under the totality of the circumstances, the defendant's will was overborne -- in finding this fact. In *Mincey* there was no dispute that the Arizona courts had indeed applied the proper legal standard. If the question of voluntariness were one of ultimate fact, therefore, the Supreme Court would simply have affirmed, noting that the proper legal standard had been applied. Instead, holding that the ultimate question of voluntariness is one of law, the Court reversed, concluding as a matter of law that the confession was involuntarily made. Thus the majority reasons, with commendable candor, that *Mincey* is overruled. Similarly, the majority concludes that the entire direct-appeal line of decisions, and the direct-appeal doctrine itself in confession cases, have been reversed sub silentio.

The ramifications of this holding are of the highest order. In the majority's view, the Supreme Court itself is barred on direct appeal from making an independent determination of the voluntariness of a confession. That function, again in the majority's view, is open to the federal courts only in habeas corpus, and only when a state court "finding" of voluntariness is not fairly supported by the record as a whole. Thus, all independent federal scrutiny over confessions -- both on direct appeal to the Supreme Court and in habeas corpus -- would be gravely impaired. It is for precisely this reason that the Supreme Court has reiterated that the ultimate question of voluntariness is a mixed question of fact and law. And it is precisely this judgment of the Supreme Court that the majority today holds has been overruled.

The majority's conclusion that this upheaval in Supreme Court jurisprudence was the work of *Miranda* is erroneous. Perhaps it is too simple to point

out that the Supreme Court decided *Mincey v. Arizona* in 1978, twelve years after the Court's decision in *Miranda*. In *Mincey*, after all, *Miranda* warnings were not given;[19] it would be a sophism indeed to rely on *Miranda* as a foundation for doctrinal change when *Miranda* itself is violated. But there is no such distinction in *Hutto v. Ross*, 429 U.S. 28 (1976) (*per curiam*).[20] In *Hutto*, a habeas corpus proceeding, the defendant had received *Miranda* warnings; indeed, he had also volunteered a confession with the advice and in the presence of counsel. 429 U.S. at 29. Despite the giving of *Miranda* warnings and the presence of counsel, the Court characterizated of voluntariness of the confession as an ultimate issue of law. In particular, the Court did not apply section 2254(d) to the issue of voluntariness. The presence of counsel and giving of *Miranda* warnings were simply factors for consideration in the determination of voluntariness. *See Davis v. North Carolina*, 384 U.S. 737, 740-41 (1966).

The theory that *Miranda* worked a doctrinal

19. Arizona officials in *Mincey* conceded the *Miranda* violation and sought to use the defendant's confession solely for impeachment, a use permitted by Harris v. New York, 401 U.S. 422 (1978). *See* 437 U.S. at 397-99.

20. All other post-*Miranda* confession cases decided by the Supreme Court involved events antedating the *Miranda* decision. Lego v. Twomey, 404 U.S. 477 (1972); Procunier v. Atchley, 400 U.S. 446 (1971); Frazier v. Cupp, 394 U.S. 731 (1969); Boulden v. Holman, 394 U.S. 478 (1969); Darwin v. Connecticut, 391 U.S. 346 (1968) (per curiam); Greenwald v. Wisconsin, 390 U.S. 519 (1968) (per curiam); Beecher v. Alabama, 389 U.S. 35 (1967) (per curiam); Clewis v. Texas, 386 U.S. 707 (1967); Davis v. North Carolina, 384 U.S. 737 (1966). In each of these cases the Court affirmed that the ultimate question of voluntariness is one of law without any suggestion that, had *Miranda* warnings been afforded, the issue

upheaval in Supreme Court jurisprudence may have been grist for an advocate's brief in *Hutto* and *Mincey*. It is not, however, a theory open to us as a inferior federal court bound by Supreme Court precedent. And it seems at least relevant that eight Federal Circuits have rejected the theory that *Miranda* altered the Supreme Court's voluntary-confession doctrine. Each of these courts addressing post-*Miranda* events has held that the ultimate question of the voluntariness of a confession is a one of law.[21]

Finally, the majority's holding sends the wrong signal to law enforcement officers. Its message -- obtain a *Miranda* waiver and only then employ "sophisticated

21. United States v. Castaneda-Castaneda, 729 F.2d 1360, 1362-63 (11th Cir. 1984); Williams v. Maggio, 727 F.2d 1387, 1390 & nn. 11-12 (5th Cir. 1984); Holleman v. Duckworth, 700 F.2d 391, 396 (7th Cir.), *cert. denied*, 104 S. Ct. 116 (1983); United States v. Robinson, 698 F.2d 448, 455 (D.C. Cir. 1983); United States v. Tingle, 658 F.2d 1332, 1333-36 (9th Cir. 1981); Jurek v. Estelle, 623 F.2d 929, 934-36 (5th Cir. 1980) (in banc), *cert. denied*, 450 U.S. 1001 (1981); Miller v. Maryland, 577 F.2d 1158, 1159 (4th Cir. 1978); United States v. Brown, 557 F.2d 541, 549-54 (6th Cir. 1977). The First Circuit has also recently held that the determination of voluntariness is not subject to section 2254(d), but has not addressed the issue for events arising after *Miranda*. Johnson v. Hall, 605 F.2d 577, 581-83 (1st Cir. 1979). Nothing in the First Circuit's decision, however, suggests that the court's analysis would change for post-*Miranda* events. *See also* United States v. Bienvenue, 632 F.2d 910, 913 (1st Cir. 1980) (issue analyzed as one of law for post-*Miranda*, non-custodial interrogation).

Cf. Alexander v. Smith, 582 F.2d 212, 217 (2d Cir.) (issue of fact), *cert. denied*, 439 U.S. 990 (1978); Lyle v. Wyrick, 565 F.2d 529, 532 (8th Cir. 1977) (subsidiary issues of fact presumed to have been found in conformance with legal conclusion when basis for state decision not specified), *cert. denied*, 435 U.S. 954 (1978); Castleberry v. Alford, 666 F.2d 1338, 1342 (10th Cir. 1982) (issue may be pure question of law, pure question of fact, or mixed question of law and fact).

modes of 'persuasion,'" *Blackburn*, 361 U.S. at 206 -- renders the court's reliance on the prophylaxis of *Miranda* sophistical and offensive.

To summarize, as recently as 1978 the Supreme Court confirmed what it had held on some fifty prior occasions. A confession is voluntary if it is the product of a free will and a rational intellect. The ultimate question of the voluntariness of a confession is one of law. While the historical circumstances surrounding the making of a confession are subject to the strictures of section 2254(d), the conclusion of voluntariness is not. The presence or absence of *Miranda* warnings is simply one factor for evaluation under the totality of the circumstances.

D. Recent Supreme Court Opinions

"Very weighty considerations," the Court has held, "underlie the principle that courts should not lightly overrule past decisions." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). The Supreme Court does not make it a practice to overrule doctrines of long standing without a reasoned explanation of its judgment. *See Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 672-77 (1982); *United States v. Reliable Transfer Co.*, 421 U.S. 397, 401-11 (1975); *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 240-53 (1970); *Moragne*, 398 U.S. at 403-05. This settled practice notwithstanding, the majority today holds that three recent Supreme Court decisions overruled *sub silentio* almost half a century of Supreme Court precedent on voluntary confessions. These cases had no such purport.

The first of these decisions, *Marshall v. Lonberger*, 103 S. Ct. 843 (1983), examined the voluntariness of a plea of guilty. The Supreme Court held:

> We entirely agree with the Court of Appeals for the Sixth Circuit that the governing standard as to whether a plea of guilty is voluntary for purposes of the federal Constitution is a question of federal law. . . . , and not a question of fact subject to the requirements of 28 U.S.C. § 2254(d). But the questions of historical fact which have dogged this case from its inception -- what the Illinois records show with respect to respondent's 1972 guilty plea, what other inferences regarding those historical facts the Court of Appeals for the Sixth Circuit could properly draw, and related questions -- are obviously questions of "fact" governed by the provisions of § 2254(d).

103 S. Ct. at 849. *Marshall* obviously undermines any suggestion that the Court had receded from its view that the ultimate question of the voluntariness of a confession is one of law. To be sure, the Court noted that "inferences regarding those historical facts" are governed by section 2254(d). But the voluntariness of a guilty plea, the Court expressly held, is not such an inference.

Moreover, the policies that moved the Supreme Court to characterize the voluntariness of a confession as an ultimate issue of law are absent in the case of a plea of guilty. The Court has never reasoned superficially that the "voluntariness" of a confession concerns a "state of mind" and that all issues of "state of mind" could be classified *a priori* as either "fact" or "legal conclusion." Our legal characterizations have deeper truths. The Court describes the voluntariness of a confession as a legal issue because confessions are the product of police interrogation generally conducted in closed proceedings and inherently coercive settings. The truth is difficult to penetrate in these proceedings; in order to prevent the shielding of claims of federal right on direct appeal to the Supreme Court, the Court retained a measure of power to draw independent

inferences from the historical facts of record. But no such circumstances are present during the allocution of a guilty plea. These pleas are entered in open court under prescribed conditions with the benefit of counsel and with a full stenographic record of the allocution. Nothing could be further from the inherently coercive setting of secret police interrogation. Thus the need for independent federal review of the voluntariness of guilty pleas is less acute than that for confessions obtained during police interrogation. And yet the Supreme Court in *Marshall* reaffirmed that the voluntariness of even a guilty plea entered in open court is a mixed question of law and fact. If *Marshall v. Lonberger* speaks at all to voluntary confessions, it counsels more strongly than ever that the voluntariness of a confession is an ultimate issue of law.

The remaining two cases on which the majority relies -- *Rushen v. Spain*, 104 S. Ct. 453 (1983) (per curiam), and *Maggio v. Fulford*, 103 S. Ct. 2261 (1983) (per curiam) -- also do not affect the voluntary-confession doctrine. Both of these cases are per curiam summary reversals decided without briefing or argument; it would be extraordinary, to say the least, if the Supreme Court intended two per curiam summary dispositions to overrule a half century of Supreme Court doctrine. But of course they do not. Neither case addresses the voluntariness of a confession. *Maggio* arguably holds that a defendant's competence to stand trial is an issue of fact subject to section 2254(d), notwithstanding the contrary holding of *Drope v. Missouri*, 420 U.S. 162, 174-75 & n.10 (1975). Like the entry of a guilty plea, however, the defendant's competence to stand trial is adjudicated in open court after a competence hearing. *Pate v. Robinson*, 383 U.S. 375, 385-86 (1966). The trial court witnesses all of these proceedings and renders

credibility findings; counsel is generally present unless that right is waived; and a stenographic record is prepared for the purpose of appellate review. The policies requiring a measure of independent federal scrutiny over confessions obtained during secret police interrogation apply with far less force to the determination of the competence of a witness to stand trial made after a *Pate* hearing.

Rushen holds that the effect of *ex parte* communications on the impartiality of a juror is a question of fact subject to section 2254(d). This unremarkable conclusion is wholly consistent with the voluntary-confession doctrine. Although such *ex parte* communications do take place outside of the presence of the trial court, they do not occur in the inherently coercive setting of police interrogation and, more importantly, do not implicate the danger of self-incrimination of the defendant. The need for independent federal scrutiny of the impact of *ex parte* communication on the jury is far more attenuated than that appropriate to the confession of a defendant offered at trial. In drawing this conclusion the *Rushen* Court nowhere even alluded to the voluntary-confession doctrine.

In short, the suggestion that *Marshall*, *Maggio*, and *Rushen* overruled the voluntary-confession doctrine *sub silentio* is simply ludicrous. That doctrine retains the vitality it has enjoyed for almost fifty years. It may be the prerogative of a majority of the Supreme Court "to overrule, *sub silentio*, a century of precedents," as Justice Roberts put it. *James v. Drawo Contracting Co.*, 302 U.S. 134, 161 (1937) (Roberts, J., dissenting). It is not, however, within the power of this court. We undermine the "public faith in the judiciary as a source of impersonal and reasoned judgments," *Moragne*, 398 U.S. at 403, by abandoning such a longstanding judicial practice on so patently baseless a

ground. The court's holding raises the gravest questions respecting adherence to the principle of *stare decisis* and concerning the appropriate role of an inferior federal tribunal in deeming so weighty a Supreme Court doctrine overthrown by so meager a force.

To the extent that *Patterson v. Cuyler* reasoned that *Marshall*, *Maggio*, and *Rushen* overruled the voluntary-confession doctrine, it reasoned incorrectly. *Patterson*'s holding, however, is merely that the voluntariness of a *Miranda* waiver is an issue of fact.[22] As such, it would not control our decision here even if the Supreme Court had been silent on the issue of voluntary confessions. *Miranda* waivers, of course, are generally obtained in closed proceedings. But there the similarity to confessions ends. A *Miranda* waiver is not inculpatory; rather, it is an agreement to accede to questioning until the permission is withdrawn. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). The policies requiring independent federal review of confessions exacted during police interrogation do not

22. Even this holding appears to be infirm. By so holding, *Patterson* places this Circuit in conflict with *Edwards v. Arizona*, 451 U.S. 477, 484-87 (1981). *Edwards*, a direct appeal to the Supreme Court, does not treat the validity of a *Miranda* waiver as a question of fact. Although the Arizona Supreme Court in *Edwards* applied an erroneous legal standard for assessing voluntariness -- the court applied the fourth amendment standard of *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973), rather than the standard of *Johnson v. Zerbst*, 304 U.S. 458 (1938) -- the Supreme Court also held as a matter of law that on the historical facts presented, the defendant's statement "did not amount to a valid waiver." 451 U.S. at 486-87. Thus, *Edwards* treats the ultimate question of the validity of a *Miranda* waiver as a conclusion of law.

Unfortunately, *Patterson* does not cite or distinguish *Edwards*. Because no petition for rehearing in *Patterson* was filed, the panel opinion's consistency with *Edwards* has not been addressed by this Circuit.

apply with equal force to a mere permission to begin questioning. And as a practical matter, *Miranda* waivers are generally evinced by signed writings. When a *Miranda* waiver is effected not by such a writing but by a defendant's unilateral statement to the police, *Edwards* holds that the validity of the waiver is a mixed question of law and fact. *See* note 22 *supra*. *Patterson* makes no effort to reconcile its conclusion with this aspect of the Supreme Court's holding in *Edwards*.

The majority suggests that *Patterson*'s reading of the "trend" of recent Supreme Court decisions has been reinforced by the Court in *Patton v. Yount*, ___ U.S. ___, 52 U.S.L.W. 4896 (U.S. June 26, 1984). Quite to the contrary, *Patton* directs the opposite conclusion. In *Patton* the Court held that the bias of a single juror is an issue of fact. 52 U.S.L.W. at 4899-4900. The Supreme Court arrived at that conclusion only after assessing the relevant reasons for categorization of the issue as a question of fact or law. The Court held:

> There are good reasons to apply the statutory presumption of correctness to the trial court's resolution of these questions. First, the determination has been made only after an often extended *voir dire* proceeding designed specifically to identify biased veniremen. It is fair to assume that the method we have relied on since the beginning . . . usually identifies bias. Second, the determination is essentially one of credibility, and therefore largely one of demeanor. As we have said on numerous occasions, the trial court's resolution of such questions is entitled, even on direct appeal, to "special deference." . . . The respect paid such findings in a habeas proceeding certainly should be no less.

52 U.S.L.W. at 4900.

These policies do not and never have applied to an assessment of the voluntariness of a confession. The task at hand is not an assessment of an individual's present state of mind. Rather, the issue is whether, during a past closed proceeding, an individual's will was overborne. This is not a determination of demeanor; it is not the case that the defendant testifies that his will overborne, the officers testify that his will was not overborne, and the trial court, assessing their demeanor, finds who is telling the truth. The determination of voluntariness requires the drawing of inferences from past events and circumstances. Those circumstances and events, of course, are "facts" -- the "external, 'phenomenological' occurrences and events surrounding the confession," as Justice Frankfurter put it. *Culombe*, 367 U.S. at 603. But the inference whether the defendant's will was overborne is an independent conclusion. The fact-finder is not present during the giving of the confession. The defendant's voice is not heard. The interrogators' methods are not seen. The fact-finder seeks instead to reconstruct the defendant's mental state after developing a record. The reviewing court is as capable of drawing that inference from the cold facts as is the trial court. *Patton*'s holding concerning juror bias, measured in court after a searching *voir dire*, consequently sheds no illumination on whether the voluntariness of a confession obtained during interrogation is an inference of fact or law. And *Patton*'s admonition to attend to the purposes served by classification of an issue as "fact" or "law" detracts from the majority's position. The Supreme Court characterizes a confession's voluntariness as an ultimate question of law because federal review over custodial police

interrogation would be frustrated if the ultimate issue were a pure question of fact.

Thus, even if we were writing on a clean slate, *Patterson*'s holding concerning *Miranda* waivers would not compel the same holding for voluntary confessions. Significantly different policies and circumstances pertain to these issues. But of course we are not writing on a clean slate. A half century of unwaivering Supreme Court precedent already compels the conclusion that the voluntariness of a confession is an ultimate issue of law.

IV.

Finally, I dissent from the majority's deference to a finding of "fact" that the New Jersey courts neither made nor purported to make. Applying the voluntary-confession doctrine, those courts treated their conclusion of voluntariness as one of law. The premise for deference under section 2254(d) to a state finding of fact is therefore altogether wanting.

The state trial court made a number of findings of historical fact. For example, the court observed that Miller had been "at the police barracks about almost two hours before this questioning started during which time I find from the testimony was not interrogated about this situation." Tr. at 145; *see* note 1 *supra*. The court treated the issue of voluntariness, in contrast, as one of law. "I think that the interview conducted by Detective Boyce meets the requirements of our law," the trial court held. Tr. at 146. "I don't consider that the offers of help made by Detective Boyce were such that they . . . overcame the will of the defendant which would make this confession involuntary." The court's reliance on *State v. Puchalski*, 45 N.J. 97, 100-01, 211 A.2d 370, 372 (1965), and *Schneckloth v. Bustamonte*, 412 U.S. 218,

223-27 (1973), clearly indicate that the trial court regarded this determination as a legal conclusion.

Similarly, in its unanimous reversal of the trial court, the New Jersey Appellate Division held that the trial court's conclusion was one of law. Under New Jersey law, the findings of the trial courts are binding on appeal unless they suffer, for example, from a "manifest lack of inherently credible evidence to support the finding, [or an] obvious overlooking or under evaluation of crucial evidence." *State v. Johnson*, 42 N.J. 146, 162, 199 A.2d 809, 818 (1964). Applying this standard, the Appellate Division sustained the trial court's findings of historical fact. "[T]he judge found," the court held, "in findings adequately supported by credible evidence in the whole record (*State v. Johnson*, 42 N.J. 146 (1964)), that *Miranda* warnings were given and in a timely manner." 76 N.J. at 413, 388 A.2d at 228. The Appellate Division did not, however, apply the *State v. Johnson* standard of appellate review to the trial court's conclusion of voluntariness. Rather, after reciting the trial court's conclusion of law, the Appellate Division held that "We are clearly persuaded of error in this determination." *Id.*

In like fashion, the New Jersey Supreme Court treated the trial court's conclusion as one of law. "We have no quarrel," that court held,

> with the legal principles expressed by the Appellate Division. We disagree, though, with its evaluation of the techniques and tactics used by the officer who questioned [the] defendant, as well as its conclusion that defendant's confession was involuntary in the constitutional sense.

76 N.J. at 402, 388 A.2d at 223. The dissent, in a discussion with which the majority did not take issue, was even more explicit. "As to the scope of appellate

review," the dissenting opinion observed, "since the issue is of constitutional dimension and is one of mixed fact-law, the reviewing court conducts a sweeping surveillance of the question practically the equivalent of *de novo* redetermination." 76 N.J. at 411-12, 388 A.2d at 228 (footnote omitted). In the case of "contested issues as to subordinate facts involving credibility of witnesses," the court added, "deference may be accorded any fact-findings thereon by the trial judge." *Id.* at 412 n.1, 388 A.2d at 228 n.1.

Thus, all eleven New Jersey judges who reviewed this confession held that the determination of the voluntariness of Miller's confession is one of law. Yet in disregard of these legal conclusions, the majority today recharacterizes their holding as one of "fact." Section 2254(d) does not require that we ignore the legal conclusions of the state courts in this fashion. That section provides that "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be presumed to be correct" unless one of the exceptions set forth in that section is established. 28 U.S.C. § 2254(d) (1982). Because none of the state courts even purported to treat the ultimate question of voluntariness as one of fact, there is no basis for deferring to any such factual conclusion under section 2254(d).

V.

"Nothing that we write," as Justice Stevens has put it, "no matter how well reasoned or forcefully expressed, can bring back the victim of this tragedy . . . ." *Brewer v. Williams*, 430 U.S. 387, 415 (1977) (Stevens, J., concurring). But the tragic circumstances of the crime before us cannot diminish our respect for constitutional principle. A conviction obtained by a confession exacted by coercion, whether psychological or physical, violates due process. Miller's confession

was the product of a will overborne by deceit, trickery, and promises of help if only he would confess. Confess he did, in an overwrought physical state requiring medical attention. A confession extracted by these psychological ploys from a defendant of unstable mental disposition and childlike maturity after an intense grilling cannot be squared with due process.

Rather than meet our responsibility to examine the voluntariness of Miller's confession independently, however, the majority characterizes this determination as a question of "fact" and purports to defer to state "findings" on this issue – findings, of course, that were never made, for the New Jersey courts faithfully adhered to the Supreme Court's consistent holding that the voluntariness of a confession as an issue of law. The majority's decision is squarely inconsistent with almost half a century of Supreme Court precedent. We have no power to treat so cavalierly the reasoned decisions of some fifty Supreme Court precedents; we certainly have no warrant for supposing that they have been overruled sub silentio by two summary per curiam dispositions of the Supreme Court addressing other issues.

I cannot join in this judgment. I dissent.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

OPPOSITION BRIEF

EDITOR'S NOTE

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

FRANK H. MILLER, JR.,

PETITIONER,

vs.

PETER J. PENTON, SUPERINTENDENT, RAHWAY STATE PRISON AND IRWIN I. KIMMELMAN, ATTORNEY GENERAL, STATE OF NEW JERSEY,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

IRWIN I. KIMMELMAN
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR RESPONDENTS
RICHARD J. HUGHES JUSTICE COMPLEX
TRENTON, NEW JERSEY

ALLAN J. NOGES
ARLENE R. WEISS
DEPUTY ATTORNEYS GENERAL
DIVISION OF CRIMINAL JUSTICE
APPELLATE SECTION
P.O. BOX CN 086
TRENTON, NEW JERSEY 08625
(609) 984-2007

OF COUNSEL AND ON THE BRIEF

[redacted]

QUESTIONS PRESENTED

1. Does the presumption of correctness in 28 U.S.C. sec. 2254(d) apply to the factual findings of a state court in its determination of voluntariness of a confession?

2. Was petitioner's confession voluntary?

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Appellate Division of the Superior Court of the State of New Jersey dated October 27, 1975, is appended to petitioner's Petition for Certiorari as Pa24. The opinion of the Supreme Court of New Jersey dated May 24, 1978, is appended to the petition as Pa41. The opinion of the United States District Court for the District of new Jersey, dated June 13, 1983, is appended to the petition as Pa69. The opinion of the United States Court of Appeals for the Third Circuit, dated August 17, 1984, is appended to the petition as Pa73. The order of the Court of Appeals for the Third Circuit denying a petition for rehearing, dated September 28, 1984, is appended to the petition as Pa106.

JURISDICTION

Respondents agree that 28 U.S.C. sec 1254(1) is the basis for this Court's jurisdiction.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V:

> ... [N]or shall any person ... be compelled in any case to be a witness against himself...

United States Constitution, Amend. XIV:

> [N]or shall any State deprive a person of life, liberty, or property, without due process of law ....

United States Code, Title 28 sec. 2254(d):

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondents shall admit --
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> (1) that the merits of the factual dispute were not resolved in the State court hearing;
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
> (3) that the material facts were not adequately developed at the State court hearing;
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
> (5) that the applicant was indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
> (6) that the applicant did not receive a full, fair and adequate hearing in the State court proceeding; or
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless the part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7) inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph number (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State was erroneous.

COUNTER-STATEMENT OF THE CASE

On August 13, 1973, at about 11:30 a.m., while Deborah Margolin was sunbathing on the porch of her home in rural East Amwell Township, New Jersey, a stranger approached in an automobile and informed her that he had seen a heifer loose at the bottom of the driveway. The stranger offered to help her retrieve the cow. Ms. Margolin declined the offer of help, and then proceeded alone in her brother's automobile to retrieve the heifer. Her brother found the automobile about half an hour later at the end of the driveway. (Petitioner's appendix at 74).

When Ms. Margolin failed to return by late afternoon, her family commenced searching for her. Her father eventually found her dead, face down in a creek, with her throat and breast cut. There were other wounds and cuts in Ms. Margolin's vagina, pelvic area, and on other parts of her body. The New Jersey State Police were then called. A number of troopers and detectives arrived on the scene at about 7:30 p.m., and took a description of the car and the stranger from the victim's brothers, who had seen him drive up to the house. One of the officers recalled that petitioner drove a car that matched the one described -- an old white car with the trunk tied shut and two dents in the side. Detective Charles Boyce of the State Police also concluded that the description of the stranger given by the victim's brothers matched petitioner's general physical characteristics. (Petitioner's appendix at 14; T410-2 to 14; 412-5 to 9; 412-16 to 422-10).[1]

Subsequent investigation revealed other evidence of petitioner's guilt. The officers investigating Deborah Margolin's murder observed footprints throughout the area in which her body was found. One of these footprints could be measured exactly due to the muddy surface of the ground. (T200-6 to T201-17). One of petitioner's shoes was obtained

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[1] T designates the trial transcript, December 3 to 6, 1983.

the next morning. It was still damp and had measurements similar to the details of the measured footprint. (T201-24 to T208-18; T268-10 to 13). Moreover, a comparison of the victim's blood with blood stained areas found covering the entire front and back portions of the front seat of petitioner's automobile indicated similar blood types. (T361-16 to 20; T367-7 to 17). Finally, at 1:00 p.m. on the day of the murder, two men engaged in road construction work a couple of miles from the Margolin farm observed petitioner driving quickly away from the direction of the farm with a "frightened look on his face." (T384-3 to 389-9).

On the night of the murder, the police located petitioner at his place of employment, and he agreed to go to police barracks for questioning. He also voluntarily turned over his penknife to the police. After being read his Miranda rights, Miller was interrogated by Detective Royce for 58 minutes. At first petitioner gave alibis for his whereabouts at the time of the murder, but later confessed to the murder. (Petitioner's appendix at 74-75, 77).

Petitioner was indicted for murder in violation of N.J.S.A. 2A:113-1 and 113-2. On December 3, 1973, the Honorable George Schoch, J.S.C., held a hearing on petitioner's motion to suppress the confession as involuntary. Judge Schoch denied the motion, ruling that petitioner's will had not been overborne. (T142-20 to 147-3). After a four day jury trial before Judge Schoch, on December 3, 4, 5 and 6, 1973, petitioner was found guilty of murder in the first degree.

On October 27, 1975, the Appellate Division of the New Jersey Superior Court reversed petitioner's conviction, holding the statement was involuntary (Appendix at 24 to 40). The New Jersey Supreme Court, on May 24, 1978, ruled that the statements were voluntary and reinstated the conviction. (Appendix at 41

to 61). On April 3, 1982, Miller petitioned for a writ of habeas corpus in the United States District Court for the District of New Jersey. On February 23, 1983, United States Magistrate John W. Devine recommended that Miller's application be dismissed. He also recommended granting a certificate of probable cause. (Appendix at 62 to 68). On June 17, 1983, the District Court filed an order and opinion dismissing Miller's application without an evidentiary hearing but granting a certificate of probable cause. (Appendix at 69 to 71).

On July 15, 1983, petitioner filed a Notice of Appeal with the Third Circuit Court of Appeals. The Court affirmed his conviction on August 17, 1984, with one judge dissenting. (Petitioner's appendix at 73). A petition for rehearing en banc was denied by the Court of Appeals on September 28, 1984. (Petitioner's appendix at 106).

SUMMARY OF ARGUMENT

The Court of Appeals for the Third Circuit properly applied the presumption of correctness in 28 U.S.C. sec. 2254(d) to the factual findings of the State court regarding the voluntariness of petitioner's confession. When abridgement of a constitutional right is in question there will ordinarily be both factual and legal aspects of the state court's determination. The deference accorded to state courts under 28 U.S.C. sec. 2254(d) must apply to the factual aspects of the state court's ruling on such an issue, if the intent of Congress to minimize the inevitable friction between state and federal courts caused by federal habeas is to be effectuated. Sumner v. Mata, 444 U.S. 539, 550 (1981), on reh. 455 U.S. 591 (1982). The opinions of this Court establish that the statutory presumption does apply to factual findings involved in a determination of a constitutional right. Patton v. Yount, ___

U.S. ___, 104 S.Ct. 2305 (1984); Sushen v. Spann, ___ U.S. ___, 104 S.Ct. 453 (1983); Maggio v. Fulford, ___ U.S. ___ 103 S.Ct. 2711 (1983); Marshall v. Lonberger, 459 U.S. 422, 103 S.Ct. 843 (1983).

The police conduct in the instant case did not overbear petitioner's will and render his confession involuntary. Petitioner was advised of, and clearly understood, his right to remain silent and to terminate the interrogation after it had begun. The detective's indication that petitioner needed help, not punishment, did not affect petitioner's decision to confess, since he at all times realized the consequences of his confession. Minor deceptions regarding the state of the evidence also had no effect on petitioner's decision to confess. Thus, the confession was voluntary. It was found voluntary in the state courts, and deference was properly paid by the federal court to this state court finding.

REASONS FOR DENYING CERTIORARI

POINT I

THE PETITION DOES NOT PRESENT A SUBSTANTIAL QUESTION BECAUSE THIS COURT'S PRIOR DECISIONS INDICATE THE PRESUMPTION OF CORRECTNESS, 28 U.S.C. sec. 2254(d), IS APPLICABLE TO THE FACTUAL ASPECTS OF A CONSTITUTIONAL QUESTION.

Petitioner contends that the Court of Appeals erred in applying the presumption of correctness, 28 U.S.C. 2254(d), to the state court's finding of voluntariness of the petitioner's confession. Petitioner concedes that deference should be given to findings of historical fact. Petitioner urges, however, that the inferences regarding petitioner's state of mind, which were drawn from these historical facts, were improperly afforded the presumption of correctness. Respondents disagree that 28 U.S.C. 2254(d) was improperly applied in this case. The opinions of this Court clearly indicate that deference is to be given all state court factual findings on federal collateral review, notwithstanding that a legal question is involved. The statutory presumption was thus properly applied to the factual aspects of the voluntariness determination in this case, in accordance with the precedent established by this Court.

Under 28 U.S.C. sec 2254(d), a state court factual finding is entitled to a "presumption of correctness," unless one of eight enumerated exceptions apply. In Sumner v. Mata, 449 U.S. 539 (1981) (Sumner I), on reh. 455 U.S. 591 (1982) (Sumner II), this Court emphasized the importance of subsection (d):

> Federal habeas has been a source of friction between state and federal courts and Congress obviously meant to alleviate some of that friction when it enacted subsection (d) in 1966 as an amendment to the original Federal Habeas Act of 1867. Accordingly, some content must be given to the provisions of the subsection if the will of Congress be not frus[illegible]

> . . . A Writ issued at the behest of a petitioner under 28 U.S.C. Sec. 2254 is in effect overturning either the factual or legal conclusions reached by the state court system under the judgment of which the petitioner stands convicted, and friction is a likely result .... [I]t is clear that in adopting the 1966 amendments, Congress in sec. 2254(d) intended not only to minimize that inevitable friction but to establish that the findings made by the state court system "shall be presumed to be correct" unless one of the seven conditions specifically set forth in sec. 1254(d) was found to exist by the feder. habeas court. [Sumner I, 449 U.S. at 550].

This legislative purpose would be largely undermined by allowing federal courts to review state court factual determinations whenever a question of law is implicated. Such would be the effect of the exception used by petitioner, where there would be no deference to a "mixed question" of law and fact.

The question of the voluntariness of a confession generally presents a question of law as well as factual issues. This Court has described the voluntariness question as involving three parts: (1) historical facts or events, (2) "'psychological' fact" or the inferences to be drawn from historical facts regarding the defendant's mental state, and (3) the application of legal standards to this psychological fact to determine if the confession was "voluntary" in the constitutional sense. Culombe v. Connecticut, 36 U.S. 568, 603 (1961). The determination of the inferences regarding a defendant's state of mind, no less than historical facts, clearly must be accorded deference under 28 U.S.C. sec. 2254(d). Marshall v. Lonberger, 459 U.S. 422, 103 S.Ct. 843, 849 (1983), (historical facts and inferences to be drawn from them are governed by sec. 2254(d)). Clearly, the determination of "psychological" fact, or the defendant's state of mind, involves factual aspects. The constitutional standard of

voluntariness and its application is a question of federal law; whether in fact the police conduct affected a defendant's mind to overbear his will is a factual determination which must be accorded deference by federal habeas corpus courts. Accord, Patton v. Yount, ___ U.S. ___ 104 S.Ct. 2885, 2890 n.12 (1984) ("the constitutional standard that a juror is impartial only if he can lay aside his opinion and render a verdict based on the evidence presented in court is a question of federal law ...; whether a juror can in fact do that is a determination to which habeas courts owe special deference....")

The fact that voluntariness involves resolution of factual issues is further evidenced by the federal procedure for determination of voluntariness: after the trial court rules that a confession is voluntary and admissible, the voluntariness issue is resubmitted to the jury. 18 U.S.C. sec. 3501(a); United States v. Scott, 590 F. 2d 531 (3d Cir. 1979); Kulyn v. United States, 414 F. 2d 139, 142 (5th Cir. 1969); Coyote v. United States, 380 F. 2d 305, 309-310 (10th Cir. 1967), cert. den. 389 U.S. 999 (1967). The jury therefore decides whether confessions are voluntary. Thus, the federal procedure indicates that the determination of voluntariness involves a fact-finding procedure, since the function of the jury is to determine issues of fact. Fed. R. Evid. 1008. (The court traditionally rules on questions of law, but may determine preliminary fact questions necessary to a finding of law, such as the admissibility of evidence. Fed. R. Evid 1008, 104.) Thus, a voluntariness determination clearly encompasses factual issues. These factual issues are subject to the statutory presumption of correctness.

When a violation of a constitutional right is alleged, there will ordinarily be a "mixed question" of law and fact. This cannot bar application of the presumption of correctness to the factual aspects of the determination. If the presumption is

not applicable to the factual findings underlying these "mixed question" determinations, it would not apply to many significant factual findings which are reviewable by habeas courts. The crucial policy considerations underlying sec. 2254(d) noted by this Court in Sumner v. Mata I, supra, will be wholly frustrated if deference is not afforded to a state court's factual findings every time a mixed question is reviewed. Such a result has not been countenanced by this Court. On the contrary, this Court has recognized that the presumption of correctness does apply to all factual determinations by state courts, even when a question of law is involved.

This Court has applied the presumption of correctness to various factual determinations where a federal question of law was implicated. In Sumner v. Mata II, supra, this Court made it clear that the statutory presumption was to apply not only to historical facts, but to inferences regarding a witness' state of mind. These inferences bore upon the mixed question of law and fact of whether an identification of a suspect was suggestive. In Rushen v. Spann, ___ U.S. ___, 104 S.Ct. 453 (1983), this Court found the presumption applicable to whether jury deliberations were biased. In Maggio v. Fulford, ___ U.S. ___, 103 S.Ct. 2261 (1983), this Court applied the presumption to a defendant's competency to stand trial. This Court deferred to the state court's determination of the impartiality of a juror in Patton v Yount, supra. Finally, in Marshall v. Lonberger, supra, this Court found the presumption of correctness applicable to the factual determination of whether the defendant understood the criminal charges to which he pled guilty. This finding was crucial to the state court's determination that defendant's plea was voluntary. The Marshall Court held that the presumption applied equally to the historical facts and the inferences regarding defendant's state of mind (i.e., whether in light of the circumstances it could be

inferred that defendant understood the charges against him). Id. at 849. Thus, the Marshall court applied the presumption to factual inferences regarding a defendant's state of mind which was dispositive of a question of law, (i.e., was his plea voluntary), the identical situation in which the presumption was applied in the instant case.

Petitioner apparently argues that his constitutional right against self-incrimination will not be protected without plenary federal review of the voluntariness of his confession.[2] As the Court of Appeals noted, however, deference to state court factual findings does not deprive federal courts of their plenary power to review the legal questions involved. Federal courts must still insure that the legal standards are interpreted and applied properly. (Petitioner's appendix at 79). Moreover, if deference is paid to factual determinations, state courts will not be able to preclude federal review by "declining to draw inferences which historical facts compel." (Culombe v. Connecticut, supra at 605). Federal courts may still reject findings which are not fairly supported by the record. 28 U.S.C. sec. 2254(d)(8). Thus, federal courts' protection of constitutional rights will not be thwarted by deferring to state court findings of facts.

In sum, this Court's decisions in Marshall, Patton v. Yount, Rushen v. Spann, Maggio v. Fulford and Sumner II established that the statutory presumption is applicable to all factual determinations, including factual aspects of a mixed question of fact and law. The deference paid by the Court of Appeals to the state court's factual findings on the effect of

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[2] Even assuming petitioner's contention that plenary federal review of the entire voluntariness determination is required, petitioner was not deprived of this protection by the Court of Appeals. The court below found that if review was plenary it would reach the same result since it agreed with the New Jersey Supreme Court concerning the effect of the police's questioning of petitioner. (Petitioner's appendix at 85-86, n.21).

the police conduct on petitioner's state of mind was therefore in accordance with precedent enuciated by this Court. The petition thus presents no substantial question for review.

POINT II

UNDER THE TOTALITY OF THE CIRCUMSTANCES, DEFENDANT'S CONFESSION WAS THE PRODUCT OF A FREE AND RATIONAL INTELLECT AND WAS THEREFORE ADMISSIBLE.

At issue here is the admissibility of a highly incriminating statement made by petitioner during the course of a 58 minute police interrogation prior to which the accused was fully advised of his constitutional rights. In reaching its conclusion that the petitioner's will was not overborne, the New Jersey Supreme Court weighed the circumstances allegedly imposing pressure in this interrogation, such as psychologically-oriented questioning techniques and implied promises of no prison sentence and psychiatric help, and misstatements of the evidence incriminating petitioner, against the petitioner's power to resist. In this regard, the court considered the presence of procedural safeguards, petitioner's prior arrests and imprisonment, familiarity with the criminal justice system, as well as his responses to the interrogating officer. (Petitioner's appendix at 46-47). The court found that petitioner was not deluded into believing that officer was acting in any capacity other than an interrogating officer and was further aware throughout the interrogation that if he confessed he would be charged with the crime and if found guilty, he would be punished accordingly. (Petitioner's appendix at 47). The court concluded that, given the petitioner's clear understanding of his Fifth Amendment rights and the nature and consequences of the interrogation, his will was not overborne. Even further, the court found that "the officer's remarks had no appreciable impact on defendant ...." State v. Miller, supra, 76 N.J. at 404, 388 A.2d at 224.

The state court's factual findings were properly presumed to be correct as they were fairly supported by the record 28 U.S.C. sec. 2254(d). Petitioner did not overcome the

presumption. Thus, the state court's determination that the detective's statements had no appreciable effect on petitioner was correctly given dispositive effect by the Court of Appeals. (Petitioner's appendix at 84).

Petitioner correctly states that the test of voluntariness is whether, under the totality of circumstances, the police conduct operates to overbear an individual's will. (Petition at 17). Culombe v. Connecticut, supra, at 602; Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973). Clearly, in this case, the detective's assertions to petitioner during the interrogation that petitioner needed help and not incarceration, and slight distortions of the evidence against petitioner did not compel him to confess.

Petitioner's mental state at the time of the interogation is the first consideration. Procunier v. Atchley, 400 U.S. 446, 454-54 (1971). The only suggestion of any susceptibility to overreaching in petitioner here arises from the fact that he had had "some dealings" with psychiatrists in the past (T114-13 to 24) and that a condition of defendant's parole was that he seek psychiatric help. (PSR5). There is no history of debilitating mental illness, however. On the contrary, his intelligent, reasoned responses to questions posed to him during the taped interviews and at the trial are evidence that his education, capacity and intelligence are quite adequate.

Moreover, there is an aspect of petitioner's background which strongly suggests his ability to resist police pressure - his prior criminal experience. During the voir dire, petitioner testified that he was fully advised of his rights on two prior occasions and that he understood his rights; once he was questioned by the police but did not give them a statement. These circumstances demonstrate that petitioner clearly

understood his rights in the interrogation context and had in fact exercised them in the past.

The circumstances surrounding the interrogation also support a finding of voluntariness. Petitioner was not held incommunicado; he was not physically mistreated; and he was not subjected to repeated questioning. The 58 minute interview was conducted by a single officer, Detective Charles Boyce, who quietly, calmly and matter-of-factly proceeded to inquire about petitioner's activities that day and his knowledge of the murder. (Petitioner's appendix at 75, 77).

Before any questions were asked, petitioner was advised of his constitutional rights, (Petitioner's appendix 2), a circumstance "quite relevant" to a finding of voluntariness. Frazier v. Cupp, 394 U.S. 731, 739 (1969); Culombe v. Connecticut, supra at 610. Petitioner explicitly stated that he was willing to talk with Detective Boyce without having an attorney present and, in fact, signed a waiver of rights form. As found by the state Supreme Court, petitioner had a working understanding of his constitutional rights in the interrogation context including the fact that he could opt to terminate the questioning at any time. State v. Miller, 76 N.J. at 397, 388 A.2d at 220. This Court has identified the defendant's right to cut off questioning as a "critical safeguard" which counteracts the coercive pressures of the custodial setting. Michigan v. Mosley, 423 U.S. 96, 103-04 (1975).

The remainder of the interrogation can be summarized as follows. Initially, Detective Boyce reviewed petitioner's account of his day. Petitioner was cooperative, giving thoughtful responses to each question. (Petitioner's appendix at 3-4). It became apparent that there was a gap of 30-40 minutes in petitioner's account at the time of the murder when petitioner was admittedly in the vicinity of the crime.

Detective Boyce then apprised petitioner of the evidence implicating him. (Petitioner's appendix 5-6). He discussed the unique characteristics of petitioner's automobile and informed him that the description given of the automobile seen at the victim's home fit his automobile.

Detective Boyce then told petitioner that he did not think petitioner had a criminal mind; that whoever committed the murder did not have a criminal mind, but had a "problem," which could be rectified. (Petitioner's appendix 7-8). When he stated, "I don't think you're a criminal, Frank," the petitioner countered, "No, but you're trying to make me one." (Petitioner's appendix 8).

Despite Detective Boyce's protestation, petitioner persisted in denying any knowledge of the murder. When Detective Boyce again asked petitioner, "you want help, don't you Frank?" the defendant replied, "Yes, uh huh, yes, but yet I'm, I'm not going to admit to something that, that I wasn't involved in." (Petitioner's appendix 9). Detective Boyce agreed with petitioner that the perpetrator had a serious mental problem requiring medical help rather than punishment. (Petitioner's appendix 9).

Detective Boyce made another sympathetic overture to petitioner, saying, "this hurts me more than it hurts you, because I love people." Petitioner rejected this sympathy, however, replying, "it can't hurt you anymore than it hurts me." (Petitioner's appendix 12). Detective Boyce then asked petitioner, "If I promise you to, you know, do all I can with the psychiatrist and everything, and we get the proper help for you ... will you talk to me about it." Petitioner rejected this offer, saying "I can't talk to you about something I'm not ...." (petitioner interrupted by Detective Boyce) (Petitioner's appendix 12).

Detective Boyce suggested that petitioner had killed the victim, but petitioner denied it. When the officer told him, "you've got to help yourself before anybody else can help you," and that he wanted to help him by seeing to it that he received the proper help, petitioner skeptically retorted, "[b]y sending me back down there [to prison]." Detective Boyce did not deny this but told petitioner that the first priority was "to let it all come out." Petitioner continued to persist that he was telling the truth. (Petitioner's appendix 15). When the officer suggested that the murder might be something for which petitioner could not be held accountable or that it could have been an accident, petitioner spurned his suggestions, and dwelled on the consequences of a possible statement -- prison and the effect "this" would have on his father. (Petitioner's appendix 16).

The detective again exhorted petitioner to tell the truth. Petitioner finally admitted that he had cut the victim in the throat with his penknife. (Petitioner's appendix 17 to 18). He went on to supply the essential facts of the crime as well as other details. (Petitioner's appendix 18 to 23).

The greater part of this interrogation was devoted to confronting petitioner with the evidence inculpating him and exhorting him to tell the truth. Detective Boyce's implied promises of psychiatric aid and non-incarceration and alleged factual inaccuracies were correctly held as not overbearing the petitioner's free will.

Firstly, confronting an accused with the facts relating to his situation is not considered inherently coercive even when the police have misrepresented the evidence or the law. Unless the misrepresentation is of such a nature as to overbear the defendant's will to resist, the deception will merely be regarded as relevant evidence to be considered in the "totality of the circumstances." Frazier v. Cupp, 394 U.S. 731, 739 (1969).

The State Supreme Court in this case rejected any suggestions that the detective lied about crucial facts in inducing petitioner to confess, namely, that the victim was identified as speaking to the victim shortly before the murder. The descriptions given of the man who spoke to the victim at her home, his clothing, and his automobile, fit the defendant. State v. Miller, supra, 76 N.J. at 405, 388 A.2d at 224.

Concededly, Detective Boyce did say that petitioner had been identified as talking to the victim before the murder. (Petitioner's appendix 9). However, this was but an unfortunate characterization of the fact, told to petitioner earlier, that the description of the stranger fit petitioner. Even if this remark were considered a deliberate misrepresentation, it still is not of the nature which would render a confession involuntary. Statements which have more clearly misrepresented the state of the evidence have not been considered overbearing. E.g., United States ex rel. Hall v. Director, 587 F.2d 194 (7th Cir. 1978), cert. den. 439 U.S. 958 (1978), (defendant falsely told that codefendant implicated him in offense); Commonwealth v. Baity, 428 Pa. 306, 237, A.2d 172, 176-177 (1968) defendant falsely told that codefendant had named him the "trigger man" in robbery-murder); State v. Mathiason, 539 P.2d 1122, 1123 (Ore. App. 1975), rev'd, e.g. Oregon v. Mathiason, 429 U.S. 711 (1977) (defendant falsely told that his fingerprints had been found at the scene of the crime).

The fact that the detective falsely indicated during the interview that the victim had died after rather than prior to discovery by the authorities would appear to have no potential for overbearing petitioner's will since, as the Court of Appeals noted, that discussion did not seem to affect petitioner at all. (Petitioner's appendix at 84). Similarly, the unverifiable statement that blood had been found on the steps of petitioner's home can not be considered inherently

coercive, especially in light of all of the real, existing evidence against petitioner which was brought to his attention. Thus, confrontation of petitioner with the evidence against him, despite the falsity of some of the allegations, was not inherently coercive. State v. Miller, 76 N.J. at 404-405, 388 A.2d at 224.

Next, the Detective's explicit offer to do what he could to see that petitioner obtained psychiatric help was proper and not unduly coercive. Petitioner urges that such references to aiding a defendant render the confession involuntary. Petitioner cites Bram v. United States, 168 U.S. 532, 542-43 (1897), for the test that a confession is not voluntary if "obtained by any direct or implied promises, however slight."

However, at a later point in Bram, this Court noted that the conclusion that a given fact was adequate to produce an involuntary confession in one instance does not establish that the same result will be created by that fact in different circumstances. Id. at 548-49. It should be stressed that in Bram the defendant was stripped of his clothing and questioned in police custody by an officer in Halifax, Nova Scotia before being brought before the American counsel.

Moreover, this Court explicitly disavowed that Bram stood for the proposition that promises automically render a confession involuntary in Brady v. United States, 397 U.S. 742, 754. This Court noted that "Bram dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed suficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess. But Bram and its progeny did not hold that the possible coercive impact of a

promise of leniency could not be dissipated . . . ." [emphasis added].

As the state Supreme Court correctly concluded, the "promise" in the instant case changed neither the status of the prosecution petitioner faced nor petitioner's perception of that prosecution. The facts necessary to an exercise of petitioner's rational intellect were not obfuscated by Detective Boyce's references to psychiatric treatment. In fact, defense counsel conceded at trial that there was never a promise that petitioner would not be prosecuted. (T13D-16 to 17). Detective Boyce carefully prevented any attempt by petitioner to treat his method of persuasion as such. (Petitioner's appendix 15). Moreover, very shortly prior to admitting it, petitioner retorted that the Detective's promise to help him would be, "By sending me back down there [to prison]." (Petitioner's appendix 19). Thus, petitioner understood very well that the Detective could not and was not promising that he would not go to prison. Any implied promise of psychiatric help was clearly within the context of an anticipated criminal prosecution. State v. Miller, supra, 76 N.J. at 404; 388 A.2d at 224. Thus, the detective's offer of "help" did not affect petitioner, much less overbear his will.

The fact that petitioner's will was not overborne is most apparent from petitioner's sarcastic and independent retorts to the detective's sympathetic ploys. When advised by the detective that "this hurts me more than it hurts you," petitioner responded "It can't hurt you any more than it hurts me" (Pa12). When Detective Boyce attempted to shift the focus of the discussion from the crime to petitioner's personal problem by saying, "I don't think you're a criminal," petitioner retorted, "but you're trying to make me one." He similarly rejected an offer of help, defiantly stating that he was not going to confess to something that he did not do. (Petitioner's

appendix 8 to 9). Petitioner also indicated that despite the officer's promise to help, he knew the police would send him back to jail after he confessed. (Petitioner's appendix 15). These statements clearly indicate that petitioner was not overawed by the questioning, that he was aware of the detective's purpose in questioning him and that his statement was the product of his own free will rather than a concession to the pressure of interrogation. United States v. Leyra, 649 F.2d 118, 120-121 (9th Cir. 1981) (factor in assessing voluntariness of confession was that the defendant was sufficiently self-possessed to tell the officer that the answer to his question was "none of his business"); Johnson v. Nell, 605 F.2d 577 (1st Cir. 1979) (defendant's hostility to officers supported a finding of voluntariness of confession).

In sum, petitioner intelligently weighed the evidence against him, fabricated a story to conform to this evidence without inculpating him, and confessed when he recognized that he had failed to extricate himself from the consequences of his crime. The opinion of the Court of Appeals below, holding that petitioner's confession was voluntary, was clearly correct.

CONCLUSION

For the foregoing reasons, respondents respectfully request that this Court deny the petition for certiorari.

Respectfully submitted,

IRWIN I. KIMMELMAN
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENTS

BY: Arlene R. Weiss
Arlene R. Weiss
Deputy Attorney General

ALLAN J. MOOES
ARLENE R. WEISS
DEPUTY ATTORNEYS GENERAL
DIVISION OF CRIMINAL JUSTICE
APPELLATE SECTION

OF COUNSEL AND ON THE BRIEF

JOINT

APPENDIX

No. 84-5786

In the Supreme Court of the United States

OCTOBER TERM, 1984

FRANK M. MILLER, JR., PETITIONER

v.

PETER J. FENTON, SUPERINTENDENT,
RAHWAY STATE PRISON, and

IRWIN I. KIMMELMAN, ESQ.,
ATTORNEY GENERAL,
STATE OF NEW JERSEY, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

PAUL MARTIN KLEIN
Assistant Deputy Public
Defender
Office of the Public Defender
Appellate Section
20 Evergreen Place, 1st Floor
East Orange, New Jersey 07018
201-266-1800
Counsel for Petitioner

ARLENE R. WEISS
Deputy Attorney General
Division of Criminal Justice
Appellate Section
Hughes Justice Complex
Trenton, New Jersey 08625
609-924-2037
Counsel for Respondent

PETITION FOR CERTIORARI FILED NOVEMBER 21, 1984.
CERTIORARI GRANTED APRIL 1, 1985.

170PP

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
Superior Court of New Jersey, Law Division:	
November 1, 1973	Indictment (No. 320 M 72) filed by Hunterdon County, New Jersey, Grand Jury, charging petitioner with murder.
December 3, 4, 1973	Motion and hearing to determine voluntariness and admissibility at trial of taped interview of petitioner and transcript thereof. Court rules taped interview admissible.
December 4, 5 and 6, 1973	Trial proceedings and jury finding of guilty of murder in the first degree.
January 11, 1974	Petitioner sentenced to New Jersey State Prison for life.
Superior Court of New Jersey, Appellate Division:	
February 5, 1974	Notice of Appeal filed with the Superior Court of New Jersey, Appellate Division.
September 16, 1975	Oral argument before Superior Court, Appellate Division.
October 27, 1975	*Per Curiam* decision of Superior Court of New Jersey, Appellate Division, reversing petitioner's conviction.
New Jersey Supreme Court:	
March 2, 1976	State's petition for certification to the New Jersey Supreme Court granted.

DATE	PROCEEDINGS
January 25, 1977	Argument before New Jersey Supreme Court.
March 7, 1978	Reargument before New Jersey Supreme Court.
May 24, 1978	New Jersey Supreme Court, in a four to three decision, reverses Appellate Division decision and reinstates petitioner's conviction and sentence.
United States District Court for the District of New Jersey:	
April 2, 1982	Petition for *Habeas Corpus* filed with the Clerk, United States District Court for the District of New Jersey.
February 23, 1983	Report and Recommendation (Civil No. 82-1175) of the United States Magistrate recommending dismissal of petitioner's application without evidentiary hearing, but with a certificate of probable cause.
June 17, 1983	Opinion of the United States District Court for the District of New Jersey (Civil No. 82-1175) dismissing petitioner's application without evidentiary hearing, but with a certificate of probable cause.
United States Court of Appeals for the Third Circuit:	
July 15, 1983	Notice of Appeal to the United States Court of Appeals for the Third Circuit.
January 24, 1984	Argument before the United States Court of Appeals for the Third Circuit.

DATE	PROCEEDINGS
August 17, 1984	Opinion of the United States Court of Appeals for the Third Circuit affirming the United States District Court's denial of Petition for Writ of *Habeas Corpus*.
August 30, 1984	Petition for Rehearing and Suggestion for Rehearing *En Banc* filed.
September 28, 1984	Petition for Rehearing denied.

(B—Detective Boyce)
(M—Frank Miller)

TRANSCRIPT OF PRE-TRIAL INTERROGATION
AUGUST 14, 1973

B. Testing 1 2 3. Testing 1 2 3. (cough) Testing 1 2 3. Testing.

B. Tuesday, (cough), Tuesday, August 14, 1973, 1:47 A.M., Flemington State Police Barracks, Detectives' room, this is the start of an interrogation between Detective William Doyle, 1884, New Jersey State Police, Detective Boyce, 2097, also from the New Jersey State Police and one Frank Melvin Miller, and this interrogation is in reference to the investigation now being conducted which involves the death of Miss Deborah Selma Margolin, white female, age 17, Brown Station Road, R.D. Ringoes, New Jersey, That's a correction, that's Bowne Station Road. This death occurring sometime approximately between 11:15 A.M., 8/13/73, and 5:45 P.M., 8/13/73.

B. Now, Mr. Miller, uh Frank, I talked to your earlier.
M. Yeah, at PFD.

B. At PFD where you're employed. I was accompanied by Trooper Robert Scott at that time.
M. Yes, sir.

B. We identified ourselves and we spoke to you on a voluntary basis in which you extended your cooperation to us, uh, in regards to this investigation of the death of the girl that I have just mentioned.
M. Yes, sir.

B. You agreed at that time, voluntarily, to speak with us in regards to this matter. . .
M. Yes, sir.

B. . . . also gave us permission while we were there to look at your vehicle . . .
M. Yes, sir.

B. . . . to take clothing from your locker. . .
M. Yes, sir.

B. . . . which is located inside the PFD plant, all of this being done, of course, with the cooperation that was extended to us from you on a voluntary basis.
M. Right.

B. Now, Frank, you've been here since approximately 11, 11:49 P.M. which would actually be yesterday, 8/13/73. What I'm going to do at this time and, of course, let me just reiterate here, you, you, you came down, you accompanied Trooper Scott and myself here on a voluntary basis, is that correct?
M. Right.

B. Okay, and of your own free will?
M. Yes, sir.

B. Without duress?
M. Yes, sir.

B. Or having been threatened to do so?
M. Right.

B. Okay, and while you were here you've been conversing, again on a voluntary basis, with Trooper Scott, is that not right?
M. Yes, sir.

B. Okay, (cough). What I'm going to do at this time, as I've indicated already, you've been here for awhile, it is now almost 2:00 A.M. on the 14th, which puts you here approximately 2 hours. I'm going to advise you at this time of your constitutional rights, which you are entitled to, and start off by saying: Number 1, you have the right to remain silent and not to answer any questions, Number 2,

if you decide to waive your right to remain silent, anything you say will be used against you if it is incriminating in nature. You have the right to be represented by an attorney before and during any questioning. If you want an attorney and cannot afford one, an attorney will be provided for you free by the State of New Jersey. Do you understand these rights, Frank?

M. Yes, sir.

B. Are you willing to talk to us without having an attorney? In reference . . .

M. Yes.

B. . . . to the, what we have talked about?

M. Yes.

B. Okay, fine.

M. But, at any time though, I can, uh, say no, right?, I mean, you know . . .

B. Yes, Frank, let me, let me go over that again.

M. Yeah, I understand that, that. . .

B. You understand your rights, Frank?

M. Yeah.

B. Okay. (cough) You may stop at anytime during this interrogation . . .

M. Yeah.

B. . . . and request to remain silent and we will honor your request.

M. Yes.

B. Okay?

M. Yeah.

B. Now, we're talking about the death of a young girl, Frank, right?

M. Yes, sir.

B. . . . very attractive, a very attractive young girl, who apparently at the time of her death was wear-

ing nothing but a bathing suit, two piece bathing suit. We feel that there's a sexual aspect at this time is a good indication that there is some type of sexual assault that's associated with this crime. . . . Before we continue, Frank, what I would like to ask you to do is, I'm going to ask you to sign the back of this card, okay, with your rights on it, indicating that you in fact have been. . .

M. Yeah, yeah. . .

B. . . . advised of your rights.

M. I got a pen right here.

B. Just sign the back of that and date it. (clanging noices). Today's the 14th.

M. You want it signed the 14th?

B. Yes, please.

M. Alright.

B. Okay.

M. Alright?

B. Thank you. Now, getting back to the, uh, the death of Miss Margolin, which we were discussing, you already related to me and Trooper Scott at the time in which you did it that as to where you were and what your activities were yesterday.

M. Right, right.

B. You indicated you came back into the Ringoes area about 11:00 A.M., is that correct?

M. It was somewheres in there, yeah, give or take a little bit of time.

B. Let's try and narrow that down, Frank. Can you think of anything that would give you any indication as to why you say now you came back into the area sometime around 11 o'clock.

M. Well, this is what I told you at the barracks, or I mean at PFD. I figured it was between 11, uh, around 11 o'clock, because I figured I go' home

around 11:30, quarter to 12, back at my parents' house and I had stopped at the Post Office in Ringoes to mail a letter which I forgot to mail this morning, or yesterday morning.

B. Alright, but, in other words what I'm saying Frank is how can you substantiate in your mind in your mind. . .

M. Uh, huh.

B. . . . as to wh . . , how, why you feel at this time that you arrived in Ringoes, went to the Post Office around 11 o'clock, can you tell me how you come to this conclusion, or what was, what activity you were involved in prior to getting, getting into Ringoes that would come to your mind as, you know, making you think that you arrived in Ringoes at 11 o'clock?

M. Well, because I was home around 11:30, quarter to 12, because, uh, so I figured, uh, it had to be somewhere around 11 o'clock that I was in Ringoes, that's about the only thing I can think of.

B. Alright, now, before, when I confronted you with the time element, you said that you were in Ringoes at 11, you got home around 12 o'clock, now, you say 11:30 or quarter to 12. Now, I'm going to ask you a question, how long does it take you to drive your vehicle from the Ringoes Post Office to your father's house?

M. That depends on how fast you go.

B. Okay, let's say if you drive at a normal rate of speed.

M. I'd say maybe 20 minutes.

B. 20 minutes. How far would you say it is, Frank?

M. Oh, 6, 7 miles, maybe.

B. 6, 7 miles. Now, you've indicated once prior to this interrogation that you got home around 12. Now

you've indicated 11:30, quarter to 12. Now, what time did you get home, Frank?

M. I'm not exactly sure.

B. Now that, now you're not sure.

M. Well, I, I say, uh, I figure anywheres from 11:30 to 12 o'clock, quarter to 12, somewheres around there. . .

B. Alright . . .

M. . . . because I didn't look at the clock.

B. Okay. Why do you think it was somewhere around there?

M. Because I got myself something to eat and, uh, got my stuff together to get ready to go to work, and I wanted to stop up the hospital to see how this fella was . . .

B. What time did you leave, how long were you, what time did you arrive at the Post Office? Approximately?

M. I'd say around 11 o'clock.

B. Okay, how long were you in the Post Office, Frank?

M. A few minutes is all.

B. A few minutes. What did you do when you walked outside, Frank?

M. Got in my car.

B. And went where?

M. Home.

B. Okay, Frank. You indicated it takes approximately 20 minutes to drive home.

M. Approximately, yeah.

B. Therefore, you would have arrived home in the area of 11:15, 11:20 A.M., but you indicated to me on 4, 5, maybe 6, 7, 8, 9 occasions already that you arrived home between quarter to 12, 12 o'clock. Now, I'm . . . am I right?

M. Yeah.

B. Okay, now this is a problem.
M. I realize this. . .

B. This creates a very serious problem.
M. Times, I uh, you know, I uh . . .

B. Oh, well, you know, it's not so much times, knowing what time it is, but you do know how long it takes you to get from point A to point B, you've already indicated . . .
M. Yeah, approximately.

B. Approximately 20 minutes.
M. Right.

B. So that's 11:15, 11:20.
M. Right.

B. 12 o'clock comes to your mind and I see a 40 minute, anywhere from a half hour to a 40 minute period . . . where are we, where are you, is what I should say?
M. Yeah.

B. And I, I just, you know, this, this, I have a big question mark in my mind right now.
M. Right.

B. Do you see my point, Frank?
M. Yes, sir.

B. That's point one. Your car, right now . . .
M. Yeah.

B. . . . is dented on the right side?
M. Right.

B. Your trunk is, I should, maybe I should use the words sprang down, because that is some type of a metal spring . . .
M. Right, yeah.

B. . . . securing the trunk of your vehicle. There is red dust on the vehicle, red dust that is visible to the naked eye . . .
M. Yeah.

B. . . . when someone looks at it. It's got red clay or dirt in and around the wheel covers . . .
M. Uh, huh.

B. . . . tires. I'l bet you right now, Frank, there is not another vehicle in Hunterdon County that fits the physical description that we, that Trooper Scott and I saw your vehicle in when we saw it up there tonight. I'll bet you, that I, I can call up a thousand people right now and there will not be another vehicle that fits the description of your vehicle. Am I right?
M. There shouldn't be, no, not with the right side of it dented in like that.

B. That's the second point. You're with me now, right?
M. Yeah.

B. Okay. Your vehicle was involved in an accident, was involved in two accidents.
M. Two accidents.

B. There was blood found on the left front interior portion of your vehicle, tonight, fresh blood.
M. Fresh blood?

B. Yes, sir. This is very, very serious.
M. I realize this.

B. That's point 3. Now, you live a few miles from the scene where this young, innocent, girl was found.
M. Uh, huh.

B. You indicate that between 11 and 12 yesterday morning, between 11 and 12, one hour, 60 minutes, you went from, according to your statement . . .
M. Right.

B. . . . the Ringoes Post Office to your house, a trip admitted to me by yourself that takes maybe 20 minutes.
M. About 20 minutes, right.

B. You wear, and you have a lot of, dark blue trousers.
M. Right.

B. You have a lot of light blue shirts.
M. Right.

B. I know, I have a lot of them in my custody now. We went to your house last night and found blood stains on the front stoop.
M. On the front stoop?

B. Yes, sir.
M. Well, how did it get there?

B. I don't know Frank. Let me ask you, how did it get there?
M. I have no idea.

B. We obtained a sample of the blood.
M. Right.

B. Obtained a sample from the vehicle.
M. Uh, huh.

B. We have a witness, Frank, now this is point 4. We have a witness who identified your car, who, no, I'm sorry, let me, I shouldn't say your car, who identified a vehicle that fits the description of your car, at this girl's home, speaking with her, telling her something about a cow being loose. Someone who was there who wanted to help her, they didn't want to hurt this girl, they didn't want to hurt this girl, Frank, they wanted to help her. You see, I know this, I know that, . . .
M. Yeah.

B. . . . because I can appreciate that, because I would have done the same thing. If there was something

to be rectified, or if somebody had a problem, I would have done the same thing. I would have wanted to help her. The vehicle that came onto the property . . .
M. Right.

B. . . . fits the description of your vehicle.
M. It does.

B. Yes. Now, that's the fourth point. And when I say fits the description, what I mean, Frank, is it fits the description to a "t", and as we talked about before, how many other vehicles are there like yours in the County right now?
M. There shouldn't be too many, if any. . .

B. If any. .
M. . . . because of the damage on the righthand side.

B. Now, what would your conclusion be under those circumstances, if someone told you that?
M. I'd probably, uh, have the same conclusion you got.

B. Which is what?
M. That I'm the guy that, that did this.

B. That did what?
M. Committed this crime.

B. What crime?
M. Well, you said before the girl was dead, killed, killed this girl.

B. Who killed this girl?
M. The guy driving this car.

B. I think the guy driving this car . . . wait, let me, I forgot something . . . we have a physical description. . .
M. Uh, huh.

B. . . . of this individual from another witness. The physical description, Frank, . . .
M. Yeah.

B. . . . fits you and the clothes you were wearing. Frank, I don't think you're a criminal. I don't think you're a criminal. I don't think you have a criminal mind. As a matter of fact, I know you don't have a criminal mind, because we've been talking now for a few hours together, haven't we?
M. Right.

B. Right?
M. Yeah.

B. You don't have a criminal mind.
M. No.

B. I know you don't. But, like I noted before, we all have problems.
M. Right.

B. Am I right?
M. Yeah, you said this over there at the plant.

B. And you agree with me?
M. Yes, sir.

B. I have problems and you have.
M. Right.

B. Now, how do you solve a problem?
M. That depends on the problem.

B. Your problem, how do we solve it? How are we going to solve it?
M. This I don't know.

B. Do you want me to help you solve it?
M. Yeah.

B. You want me to extend all the help I can possibly give you, don't you?
M. Right.

B. Are you willing to do the same to me?
M. Yeah.

B. Now, I feel . . .
M. Yeah

B. . . . who is ever, whoever is responsible for this act . . .
M. Yeah.

B. He's not a criminal. Does not have a criminal mind. I think they have a problem.
M. Uh, huh.

B. Do you agree with me?
M. Yeah.

B. They have a problem.
M. Right.

B. A problem, and a good thing about that, Frank, is a problem can be rectified.
M. Yeah.

B. I want to help you, I mean I really want to help you, but you know what they say, God helps those who help themselves, Frank.
M. Right.

B. We've got to get together on this. You know what I'm talking about, don't you?
M. Yeah, especially if they're trying to say that, you know, that like you say, I'm identified and my car's identified, and uh, we got to get together on this.

B. Yes we do. Now, that's only a few of the items. . .
M. Uh, huh.

B. . . . that we have now. Your problem, I'm not, let's forget this incident, okay . . .
M. Yeah.

B. . . . let's forget this incident, let's talk about your problem. This is what, this is what I'm concerned with, Frank, your problem.
M. Right.

B. If I had a problem like your problem, I would want you to help me with my problem.
M. Uh, huh.

B. Now, you know what I'm talking about.
M. Yeah.

B. And I know, and I think that, uh, a lot of other people know. You know what I'm talking about. I don't think you're a criminal, Frank.
M. No, but you're trying to make me one.

B. No I'm not, no I'm not, but I want you to talk to me so we can get this thing worked out. This is what I want, Frank. I mean it's all there, it's all there. I'm not saying. . .
M. Let me ask you a question.

B. Sure.
M. Now, you say this girl's dead, right?

B. She died just a few minutes ago. I just got . . . that's what that call was about.
M. Cause Officer Scott said she was in the hospital and I said well then let's go, you know, go right over there.

B. She was in the hospital. . .
M. And, uh . . .

B. . . . the call that Detective Boyle got, that's, that's what that call was.
M. Cause, I told him . . .

B. Are you, do you feel what I feel right now?
M. I feel pretty bad.

B. Do you want to talk to me about it?
M. There's nothing I can tell . . .

B. About how you feel?
M. . . . there's nothing I can talk, I mean I feel sorry for this girl, I mean, uh, that is something that, you know . . .

B. That what?
M. Well, it's a shame, uh . . .

B. What did she say to you?
M. Beg your pardon?

B. What did she say to you
M. Who?

B. This girl?
M. I never talked to this girl. If she was to walk in here now, I wouldn't know, know that she was the girl that, uh, you're talking about.

B. But you were identified as being there talking to her minutes before she was . . . probably this thing that happened to her. How can you explain that?
M. I can't.

B. Why?
M. I don't know why, but I, I, you know, how can I explain something that I don't know anything about.

B. Frank, look, you want, you want help, don't you Frank?
M. Yes, uh huh, yes, but yet I'm, I'm not going to admit to something that, that I wasn't involved in.

B. We don't want you to, all I want you to do is talk to me, that's all. I'm not talking about admitting to anything Frank. I want you to talk to me. I want you to tell me what you think. I want you to tell me how you think about this, what you think about this?
M. What I think about it?

B. Yeah.
M. I think whoever did it really needs help.

B. And that's what I think and that's what I know. They don't, they don't need punishment, right? Like you said, they need help.
M. Right.

B. They don't need punishment. They need help, good medical help.
M. That's right.
B. . . . to rectify their problem. Putting them in, in a prison isn't going to solve it, is it?
M. No, sir. I know, I was in there for three and a half years.
B. That's right. That's the, that's not going to solve your problem is it?
M. No, you get no help down there. The only thing you learn is how to, you know. . .
B. Well, let's say this Frank, suppose you were the person who needed help. What would you want somebody to do for you?
M. Help me.
B. In what way?
M. In any way that they, they see, you know, fit, that it would help me.
B. What, what do you think compels somebody to do something like this. What do you think it is, Frank?
M. Well, it could be a number of things.
B. Give me an example.
M. It could be a person that, that drinks, uh, you know, a lot, and just, you know, don't know what they, what they did once they been drinking. It could be somebody with narcotics that, that don't know what they're, you know, what they're doing once they shot up or took some pills or whatever they do, I don't know, I'm not a drug addict and never intend to be.
B. What else Frank? What other type of person would do something like this?
M. Somebody with a mental problem.
B. Right. Somebody with a . . .
M. Mental problem. . .

B. . . . serious mental problem, and you know what I'm interested in, I'm not, I'm interested in, in preventing this in the future.
M. Right.
B. Now, don't you think it's better if someone knows that he or she has a mental problem to come forward with it and say, look, I've, I've, I've done these acts, I'm responsible for this, but I want to be helped, I couldn't help myself, I had no control of myself and if I'm examined properly you'll find out that's the case. Is that right or wrong?
M. Yeah, that, they should be examined and, uh, you know, maybe a doctor could find out what's wrong with em.
B. Have you ever been examined?
M. Yes.
B. Alright.
M. Dr. Taylor over here at the Medical Center, I seen him two, maybe three times and last time I was there he gave me a test. . .
B. Uh, huh.
M. . . . uh, it was a bunch of bull shit, in plain English. If the big wheel turns one way, what way does the little wheel turn? So I took that test. He says, alright, he says, I say when do I come back, because this is part of my parole.
B. I see.
M. And he says, uh, I'll call you and let you know, he says I want to get this, work this test out first. He up to this date, the man has never called me, uh . . .
B. How do you feel about this?
M. Well, I think it's wrong.
B. Would you, do you, did you feel that after not finding out the results of that test that you might do something that you might not be responsible for?
M. No.

B. Did you feel that you were capable, maybe, of doing something because you didn't get the results of this, because they didn't like, help you, did they?
M. No.

B. Well, then did you still feel this way that something might happen it would be their fault because, as far as I'm concerned if something did happen, it's not your fault, it's their fault. . .
M. Right.

B. . . . because that was a part of your parole . . .
M. Right.

B. . . . and they didn't live up to it.
M. Right.

B. You agree with me?
M. Yeah, that . . .

B. So, therefore, if you did commit an act, actually they're the ones that are to blame, in my eyes . . .
M. Right.

B. . . . not you as an individual. You were there seeking help. You went there, they didn't, right, you went there voluntarily, right?
M. Right. It was, uh, it was all set up through . . .

B. It was all set up.
M. . . . the parole board, or well, my parole officer, I believe set it up. At that time it was, uh, Gene, uh, DiGennie, I believe his name was.

B. DiGianni.
M. DiGianni.

B. Frank, you're very, very nervous. Now, I, I don't, you know, you, you're, you understand what I'm saying?
M. Yeah, I know what you're saying.

B. Now, there's a reason for that, isn't there?
M. Yes.

B. Do you want to tell me about it?
M. Being involved in something like this is . . .

B. Is what, does it, does it, does it visibly shake you physically?
M. Yes, it does, because, well, Officer Scott can tell you, it ain't been not even a month ago I sat right in the same room . . .

B. Uh, huh.
M. . . . behind the girl that I really loved, because she was a minor her father forced her into making statements, which, she didn't lie on the statements. I tried to cover up with Officer Scott until I heard from her and she said yes, she says, I did tell him, she says, I had to tell him. So, then when I talked to my lawyer, you know, I admitted to him, I admitted to my parole officer, I said I'm not making a liar out of the girl, cause I love her too much and so I admitted, you know, he asked me if we were having sex . . .

B. Alright. What . . .
M. . . . and, uh, I had no intentions of making a liar out of her.

SIDE TWO

B. Testing 1 2 3. Testing.

B. Now listen to me Frank. This hurts me more than it hurts you, because I love people.
M. It can't hurt you anymore than it hurts me.

B. Okay, listen Frank, I want you . . .
M. I mean even being involved in something like this.

B. Okay. listen Frank, If I promise to, you know, do all I can with the psychiatrist and everything, and we get the proper help for you, and get the proper help for you, will you talk to me about it?
M. I can't talk to you about something I'm not . . .

B. Alright, listen Frank, alright, honest. I know, I know what's going on inside you, Frank. I want to help you, you know, between us right now. I know what going on inside you. Frank, you've got to come forward and tell me that you want to help yourself. You've got to talk to me about it. This is the only way we'll be able to work it out. I mean, you know, listen, I want to help you, because you are in my mind, you are not responsible. You are not responsible, Frank. Frank, what's the matter?

M. I feel bad.

B. Frank, listen to me, honest to God, I'm, I'm telling you, Frank, (inaudible). I know, it's going to bother you, Frank, it's going to bother you. It's there, it's not going to go away, it's there. It's right in front of you, Frank. Am I right or wrong?

M. Yeah.

B. You can see it Frank, you can feel it, you can feel it but you are not responsible. This is what I'm trying to tell you, but you've got to come forward and tell me. Don't, don't, don't let it eat you up, don't, don't fight it. You've got to rectify it, Frank. We've got to get together on this thing, or I, I mean really, you need help, you need proper help and you know it, my God, you know, in God's name you, you, you know it. You are not a criminal, you are not a criminal.

M. Alright. Yes, I was over there and I talked to her about the cow and left. I left in my car and I stopped up on the road where, you know, where the cow had been and she followed me in her car . . .

B. Right.

M. . . . and the cow wasn't down there and we started walking through the fields and stuff, and you could see where the cow was.

B. Uh, huh.

M. Now, I don't know . . .

B. Now, Frank please . . .

M. Wait, wait a minute.

B. I'm sorry, I'm sorry.

M. Okay, okay.

B. Go ahead, I'm sorry.

M. I don't know where this guy come from. . .

B. Tell me about him, I'm sorry, go ahead.

M. But. . .

B. Tell me about him Frank. . .

M. Alright, he, alright, he grabbed her. . .

B. Right.

M. . . . that's how I got the cut on my hand, I didn't get cut in the car.

B. Alright, tell me what happened. Tell me what hap-happened. Let it come out, Frank, let it come out. This is what you need, Frank. I'm, it's you and me, now listen.

M. Alright now, he, you know I, tried to get ahold of him and he cut me in the hand with the knife, and he'd already cut her, and then he ran.

B. Alright.

M. So first thing I thought, you know, try and help her. I got her in the car and she just, you know, she just fell over and I got scared because, you know, I thought she was dead.

B. Alright.

M. So, I got down by the bridge, I just, you know, laid her off there and got the hell out of there because I was scared, because, you know. . .

B. Let it come out, Frank. I'm here. I'm here with you now. I'm on your side, I'm on your side, Frank.

I'm your brother, you and I are brothers Frank. We are brothers, and I want to help my brother.

M. If I hadn't went down on that road I wouldn't even have been involved in it.

B. Frank, listen. . .

M. It was a shorter way home from, from the Post Office. I'm not lying about that Post Office or nothing. I came out past that cemetery and up that, up that dirt road . . .

B. Alright, let's . . .

M. . . . because I could have, you know, swung off at the Whitehall area, I could have swung off and went through the back way to the house.

B. Let's, Frank, listen. Let's go back to the Post Office, okay? Did you go to the Post Office?

M. Yes.

B. Okay . . .

M. There was one . . .

B. Tell me . . .

M. . . . one woman there, I don't, I don't, I couldn't even begin to describe.

B. Now tell me where you went. Tell me again about this incident, okay?

M. Right.

B. Alright Frank, tell me what happened.

M. I left the Post Office, you want to go from the Post Office, right?

B. Uh, huh.

M. Alright. Alright, then I stuck the letter in the mailbox, the out of town mail, and I left there and I could, went up, was gonna go up the back way because it was a shorter way home. Then I seen this cow along the road and there was a farm there so I figured, you know, it must be their cow. So, I went

in there, and I started to get out of the car and the dogs barked so I blew the horn. . .

B. Right.

M. . . . because I wasn't about, I didn't know whether this dog would bite or not. And, I blew the horn two or three times and then this girl come out.

B. Do you remember what the girl looked like? What was she wearing?

M. She was wearing a two piece bathing suit, like you said.

B. Go ahead.

M. I told her there was a cow out there and she said, yeah it's probably one that's always getting out. And I said well do you need a help, you got anybody here to help you get it in and she says, uh, I don't need no help, she says I can get it back myself. So, I went out, went up the road there, out the driveway, she was following me in her car. I think a Corvair, or. So, I stopped up the road there where I, where I had seen the cow and, uh, the cow wasn't there. She pulled up behind me, she got out of the car and I said the cow was here. Well, you can see the marks where the cow had been and we started walking through the, through the field there, uh, it'd be on your lefthand side. And, like I say, I don't know where this guy come from.

B. Tell me what happened.

M. Well, I heard her scream. She, I was walking more or less along the hedgerow there, or trees, whatever you want to call it. I heard her scream and I turned around and I seen a guy there, I'd say he was maybe my height, maybe a little taller, a little smaller, and I don't know, when, when I ran up there he whipped on me, that's how I got this, and . . .

B. Listen Frank, this guy, do you know him? Do you know where he lives?
M. No, I don't know where he lives.

(Inaudible 171-173)

B. You killed this girl didn't you?
M. No, I didn't.

B. Honest, Frank? It's got to come out. You can't leave it in. It's hard for you, I realize that, how hard it is, how difficult it is, I realize that, but you've got to help yourself before anybody else can help you. And we're going to see to it that you get the proper help. This is our job, Frank. This is our job. This is what I want to do.
M. By sending me back down there.

B. Wait a second now, we don't talk about going back down there. First thing we have to do is let it all come out. Don't fight it because it's worse, Frank, it's worse. It's hurting me because I feel it. I feel it wanting to come out, but it's hurting me, Frank. You're my brother, I mean we're brothers. All men on this, all men on the face of this earth are brothers, Frank, but you got to be completely honest with me.
M. I'm trying to be, but you don't want to believe me.

B. I want to believe you, Frank, but I want you to tell me the truth, Frank, and you know what I'm talking about and I know what you're talking about. You've got to tell me the truth. I can't help you without the truth.
M. I'm telling you the truth. Sure, that's her blood in the car because when I seen the way she was cut I wanted to help her, and then when she fell over I got scared to even be involved in something like this, being on parole and . . .

B. I realize this, Frank, it may have been an accident. Isn't that possible, Frank? Isn't that possible?
M. Sure, it's possible.

B. Well, this is what I'm trying to bring out, Frank. It may be something that, that you did that you can't be held accountable for. This is, I can help you, I can help you once you tell me the truth. You know what I'm talking about. I want to help you, Frank. I like you. You've been honest with me. You've been sincere and I've been the same way with you. Now this is the kind of relationship we have, but I can't help you unless you tell me the complete truth. I'll listen to you. I understand, Frank. You have to believe that, I understand. I understand how you feel. I understand how much it must hurt you inside. I know how you feel because I feel it too. Because some day I may be in the same situation, Frank, but you've got to help yourself. Tell me exactly what happened, tell me the truth, Frank, please.
M. I'm trying to tell you the truth.

B. Let me help you. It could have been an accident. You, you've got to tell me the truth, Frank. You know what I'm talking about. I can't help you without the truth. Now you know and I know that's, that's, that's all that counts, Frank. You know and I know that's what counts, that's what it's all about. We can't hide it from each other because we both know, but you've got to be willing to help yourself. You know, I don't think you're a criminal. You have this problem like we talked about before, right?
M. Yeah, you, you say this now, but this thing goes to court and everything and you . . .

B. No, listen to me, Frank, please listen to me. The issue now is what happened. The issue now is truth. Truth is the issue now. You've got to believe this, and the truth prevails in the end, Frank. You have

to believe that and I'm sincere when I'm saying it to you. You've got to be truthful with yourself.

M. Yeah, truth, you say in the end, right? That's why I done three and a half years for . . .

B. Wait, whoa. . . whoa

M. . . . for a crime that I never committed because of one stinkin detective framing me. . .

B. Frank, Frank.

M. . . . by the name of Rocco.

B. Frank, you, you're talking to me now. We have, we have a relationship, don't we? Have I been sincere with you, Frank? . . .

M. Yeah, you . . .

B. . . . Have I been honest?

M. . . . Yes.

B. Have I dealed your problem, Frank? Have I been willing to help you? Have I stated I'm willing to help you all I can?

M. Yes.

B. Do I mean it?

M. Yes.

B. Whenever I talk to anybody I talk the same way, because you have a very, very serious problem, and we want to prevent anything in the future. This is what's important, Frank, not what happened in the past. It's right now, we're living now, Frank, we want to help you now. You've got a lot more, a lot more years to live.

M. No, I don't.

B. Yes, you do.

M. No, I don't.

B. Don't say you don't. Now you've got to tell me.

M. Not after all this, because this is going to kill my father.

B. Listen, Frank. There is where you, the truth comes out. Your father will understand. This is what you have to understand, Frank. If the truth is out he will understand. That's the most important thing, not, not what has happened, Frank. The fact that you were truthful, you came forward and you said, look I have a problem. I didn't mean to do what I did. I have a problem, this is what's important, Frank. This is very important, I got, I, I got to get closer to you, Frank, I got to make you believe this and I'm, and I'm sincere when I tell you this. You got to tell me exactly what happened, Frank. That's very important. I know how you feel inside, Frank, it's eating you up, am I right? It's eating you up, Frank. You've got to come forward. You've got to do it for yourself, for your family, for your father, this is what's important, the truth, Frank. Just tell me, you didn't mean to kill her did you?

M. I thought she was dead or I'd have never dropped her off like that.

B. Why, Frank? Frank, look at me, okay? I'm lookin at your problem now. Just picture this, okay? I'm lookin at your problem, okay? You follow me?

M. Uhm.

B. What made you do this, please tell me. Please tell me now. What made you do this?

M. I don't know.

B. Alright, explain to me, how, exactly how it happened and then we'll see, maybe we can find out why it happened, alright? Is that fair? Just tell me how it happened and then we'll talk about why it could have happened. This is what's important to me.

M. I don't even know.

B. Well, just tell me what happened, tell me the truth this time. Please, I can't help you without the truth.

M. Like I said I went, I went there because the cow was out . . .

B. I know that and . . .
M. Wait, wait, alright, wait a minute. She followed me out the driveway. We stopped up there on the road. The cow wasn't around and we were talkin. She got in my car. We figured the cow might be down on the other road, or down further.

B. You want it to happen.
M. Yes.

B. Okay. When you got down there, Frank, when you went down there, something happened inside you. This is what I'm interested in, now please tell me, you've got to, you've got to get the proper help, Frank, we want to help you. Please tell me, Frank.
M. I don't know what happened, I really don't.

B. Alright, but tell me, tell me how it happened, the truth this time, Frank.
M. I can't even tell ya that.

B. Well, tell me, tell me Frank, (inaudible) . . . have to be completely truthful with me the way I am with you. It's so important, Frank, honest to God, because people believe truth. I mean, Frank, this is hurting me, God listen. I just want you to come out and tell me, so I can help you, that's all. Listen, it's the right way.
M. I, I swear to God, I don't know what happened down there.

B. Why? Why did you do it?
M. I don't even know that.

B. What did you, what did you cut the girl with? What did you use, Frank?
M. A penknife.

B. Your penknife?
M. Yes, sir.

B. Which penknife?
M. The one you have.

B. The one I have?
M. Yes.

B. Where did you cut her, Frank?
M. In the throat.

B. In the throat?
M. Uh, huh.

B. Now, right before you cut her in the throat, what, why did you cut, did, was she fighting you off?
M. No.

B. She wasn't fighting you?
M. No.

B. Why do you think, where were you when you cut her in the throat? Where were you, where were you at, at that moment?
M. Down by the bridge.

B. Down by the bridge?
M. Yes.

B. Were you in the vehicle or were you outside the vehicle?
M. In the car.

B. You were in the car?
M. Yes.

B. Okay, now, you were in the car, right?
M. Uh, huh.

B. Did she get in the car voluntarily?
M. Yes.

B. She did?
M. Yes.

B. Did you ask her to get into the car?
M. Yes.

B. What did you say to her, Frank?
M. I said, why don't we go on down the road and see if the cow's down there.

B. And she got in the car with you?
M. Yes.

B. Where did she get in the car with you?
M. Up on the main road.

B. Where she parked her car?
M. Yes.

B. Alright. Then you drove down by the bridge.
M. Right.

B. Okay, now. What happened in the car? Where did you have your knife?
M. In my pocket.

B. In your pocket?
M. Yes.

B. And, when did you take it out?
M. From there everything's a blank.

B. Well . . .
M. I didn't, as far as what, you know, what really . . .

B. Alright, well where did you cut her with the knife?
M. In the car.

B. Did she fight you in anyway.
M. No.

B. Did you cut any other part of her body, Frank?
M. No, not that I, no, not that I know of.

B. Did you bite her in anyway, Frank?
M. No, not that I know of.

B. Not that you know of?
M. No.

B. Did she bleed a lot in the car, Frank?
M. Some, yes.

B. What happened to the blood that was in the car, Frank? Did you clean the car, Frank? Did you clean the car out after the blood was in the vehicle?

M. There wasn't really, no, I, I just, you know, wiped what little bit was on the seat.

B. Alright. After you cut her throat, now, what did you do then? After that, after that happened, what did you do then, Frank?
M. I don't know, I, everything just, everything's a blank, really.

B. Well, try and remember now. What, did you get out of the vehicle?
M. I guess. Yeah, I, I got, I got out of the car and I took her out of the car. . .

B. Alright, then what did you do?
M. Carried her over the bridge.

B. Threw her over the bridge?
M. Yes.

B. Did, then, after you threw her over the bridge, then what did you do, Frank?
M. I didn't do, I don't know.

B. Did you drag, did you drag her any further after you threw her over the bridge?
M. I don't think so, no.

B. Try and remember now, it's very important. I'm sure you can understand that, right?
M. Yeah.

B. Try and remember now. You threw her over the bridge . . .
M. Yeah.

B. . . . Now, did you go down and look at her again?
M. I don't really know.

B. Okay. Did you, did you have sexual relations with her, Frank?
M. Not that I know of.

B. Are you sure now? Think hard. Think hard now, while you were in the car?
M. I don't think so.

B. Alright. After she, after you threw her out over the bridge?
M. Yeah.

B. Is that where you had the sexual relations with her?
M. I don't think I did.

B. Did you remove any of her clothing, Frank?
M. I don't believe so, no. I don't really know.

B. Alright. Now think about, did you try and drag her body anywhere?
M. I don't think so.

B. Did you drag the body up towards the water anywhere?
M. I don't think so, no. I say I, I don't know, I . . .

B. Where, once again now, you're in the car with her right?
M. Uh huh.

B. Now, did you pull the knife out right away? What did you say to her, Frank, before you pulled the knife out? Did you ask her anything?
M. I don't know if I did or not.

B. And you said the pocket knife, what pocketknife were you referring to now, that you used.
M. The one you have.

B. The one that you gave me at PFD Plastics?
M. Yeah.

B. And whereabouts did you cut her?
M. In the throat.

B. In the throat? Is there any reason why you cut her in the throat, Frank?
M. No, not that I know of.

B. Did you, did you caress her breasts in anyway?
M. No.

B. Was she an attractive girl?
M. Um, I'd say so, yes.

B. About what time was that, Frank?
M. I'm not sure.

B. About what time?
M. Well, I was at the Post Office around, I figure 11 o'clock, so it had to be after that.

B. It happened sometime after that, about, about how long?
M. I'd say maybe five after, ten after, something like this. That's about all the time it would take to go from the Post Office to there.

B. And what road were you on when this, when you cut her throat in the vehicle, what road were you on?
M. I don't know the road exactly.

B. Was it a dirt road, Frank?
M. Yes.

B. It was a dirt road?
M. Yes.

B. Did you see anybody at the house when you were there?
M. Just her.

B. Did you see any of her brothers?
M. No.

B. Did you see anyone else?
M. No. No one came out but her.

B. Did you cut any other portion of her body, Frank? Just, just think hard, now, take your time, ah you know, I realize that, you know, that, just take your time and think, did you cut any portion of her body? Did you cut her breasts?
M. No.

B. Are you sure, Frank?
M. Positive.

B. Did you bite her in anyway?
M. I don't think . . .

B. Tell me the truth, Frank. Honest? You've been so honest with me so far, you've been truthful, you've been sincere. Now, after you threw, how did you, which car, which car did you, uh, side of the car did you drag her out of?
M. The driver's side.

B. Driver's side?
M. Yeah.

B. I see. Did you clean your car in anyway?
M. Yeah.

B. Where, where did you clean your car, Frank?
M. I used the hose at home.

B. At home?
M. Yeah, in the driveway.

B. And did you enter your house through the front door, Frank?
M. Through the breezeway.

B. Through the breezeway?
M. Yeah.

B. Where are the rags? What did you use to clean the car out with?
M. I just used the hose.

B. The hose?
M. Yeah.

B. You washed it out?
M. Yes.

B. Where was the vehicle when you washed it out, Frank?
M. In the driveway.

B. In the driveway? Did you use any type of rag on the inside of the car?
M. Just a . . . no.

B. Are you sure, Frank?
M. There was a . . . I had a paper bag, a brown paper bag and then I just wiped some of the water off of the seat and stuff.

B. Where is the brown paper bag now, Frank What did you do with it?
M. I threw it away.

B. Where did you throw it, Frank?
M. Driving along the road on my way up to Flemington.

B. Where, do you remember on which road you were, or how far you were away from the house when you threw it out the window?
M. No, I don't.

B. You don't have any idea, Frank?
M. No.

B. Now, did you actually throw her over the, uh, the fence there, the rail?
M. Yes.

B. You did?
M. Yes.

B. Did you go, after you threw her over the fence, did you go down and look at her again to see if she was dead?
M. I don't believe I did, no.

B. Was there anyone with you, Frank, when this occurred, or were you alone? You indicated before that you were alone, were you alone with her when this happened?
M. Yeah.

B. I see. Were you driving your car, Frank?
M. Yeah.

B. What kind of car do you drive?
M. A white Mercury.

B. What year is that Mercury?
M. '69.

B. '69? Is there any damage, is there any damage to your vehicle?
M. Yes.

B. Where is the damage?
M. Righthand side.

B. Is your trunk tied down?
M. Yes.

B. Alright. I've indicated before that you would be willing to sit down with me and the Assistant Prosecutor and indicate to him, like you said, that you have a problem.
M. uh, huh.

B. Would you be willing to sit down with us while we take a statement from you?
M. Yes.

B. So it can be incorporated, you follow me?
M. Yeah.

B. In order to help you.
M. Uh, huh.

B. Would you be willing to do that?
M. Uh, huh.

B. Now, is there anything I can get you now? You want coffee?
M. No.

B. You want to just sit here for awhile?
M. Yes.

The time now is 2:45 A.M. Statement concluded at this time. Statement and interrogation concluded at this time.

OPINION OF THE NEW JERSEY SUPERIOR COURT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-1275-73

STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT

v.

FRANK MELVIN MILLER, JR., DEFENDANT-APPELLANT

Argued September 16, 1975

Decided October 27, 1975

Before Judges Fritz, Seidman and Milmed

On appeal from Superior Court of New Jersey
Law Division, Mercer County

Mr. E. Neal Zimmerman, Designated Attorney, argued the cause for appellant (Mr. Stanley C. Van Ness, Public Defender, attorney).
Mr. Peter N. Gilbreth, Deputy Attorney General, argued the cause for respondent (Mr. William F. Hyland, Attorney General of New Jersey, attorney).

PER CURIAM

Defendant was convicted by a jury of murder in the first degree. He appeals on a number of grounds. The principal one of these is a challenge to the voluntariness of a confession.

We are extraordinarily fortunate in having before us the transcript of a tape recording made during the interrogation which led to the confession. This obviates any need to speculate with respect to that which transpired. Operating, then, from this unique vantage point, we first declare our allegiance to the "decent" hope that a guilty man may stub his toe. *State v. McKnight*, 52 *N.J.* 35, 52 (1968). Then we deplore the techniques and tactics which extracted this confession and which, in our judgment, denied defendant due process of the law.

A *Miranda* (*Miranda v. Arizona*, 384 *U.S.* 436 (1966)) *voir dire* was held. Thereafter the judge found, in findings adequately supported by credible evidence in the whole record (*State v. Johnson*, 42 *N.J.* 146 (1964)), that *Miranda* warnings were given and in a timely manner. Then the trial judge, recognizing the "only real problem" as being one of "whether or not there was any cajolery, inducement, combination thereof that overcame the will of the defendant so that his subsequent answers to the several questions were not, 'voluntary'," and relying upon the definition of "voluntary" found in *Schneckloth v. Bustamonte*, 412 *U.S.* 218 (1973), determined the confession to be admissible. He said,

> I don't think there was any trickery either apparent or inferable in this statement. The most that can be said as [defense counsel] has indicated a promise of help. There is no question that is in the statement, but I do not find that promise was such as to cause this confession to be inadmissible and therefore it will be received in evidence subject to certain deletions about which we should talk now I presume.

We are already persuaded of error in this determination.

The tape transcript must be read in its entirety for its full aroma to be savored. The interrogation began (at

two o'clock in the morning) gently enough with a recitation of an earlier discussion between the interrogating trooper and defendant at the latter's place of work. It prodded defendant (almost kindly; the trooper continually addressed defendant both patronizingly and by his first name) about his whereabouts and activities on the previous day. Then a minor discrepancy in defendant's timetable arose. The trooper pressed his advantage, again gently. "Okay, now," he told defendant, "this is a problem." Defendant said, "I realize this . . ."

Then the trooper pointed out that defendant's vehicle had some damage, some red clay or dirt, and [1]

> T. There was blood found on the left front interior portion of your vehicle, tonight, fresh blood.
> D. Fresh blood?
>
> T: Yes, sir. This is very, very serious.
> D: I realize this.
>
> T: That's point 3. • • •

Then came the first significant police statement assertedly untrue because as defendant graphically points out in his brief, "no evidence at all of this crucial fact was presented at trial."

> T: We have a witness, Frank, now this is point 4. We have a witness who identified your car, who, no, I'm, I'm sorry, let me, I shouldn't say your car, who identified a vehicle that fits the description of your car, at this girl's home, speaking with her, telling her something about a cow being loose. Someone who was there who wanted to help her, they didn't want to hurt this girl, they didn't want to hurt this girl, Frank, they

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[1] In transcript quotations hereafter, "T:" signifies the question or comment from the trooper, and "D:" signifies defendant's response. Emphasis in any of the quotations which follow from the tape transcript is, of course, added.

wanted to help her. You see, I know this. I know that, . . .

D: Yeah.

If this was untrue, what followed immediately thereafter was obviously designed to capitalize on the chicane:

T: . . . because I can appreciate that, because I would have done the same thing. If there was something to be rectified, or if somebody had a problem, I would have done the same thing. I would have wanted to help her. The vehicle that came onto the property . . .

D: Right.

T: . . . fits the description of your vehicle.

D: It does.

T: Yes. Now, that's the fourth point. And when I say fits the description, what I mean, Frank, is it fits the description to a "t", and as we talked about before, how many other vehicles are there like yours in the County right now?

D: There shouldn't be too many, if any. . .

T: If any. .

D: . . . because of the damage on the righthand side.

T: Now, what would your conclusion be under those circumstances, if someone told you that?

D: I'd probably, uh, have the same conclusion you got.

T: Which is what?

D: That I'm the guy that, that did this.

T: That did what?

D: Committed this crime.

The trooper then told defendant that "we have a physical description • • • from another witness" which "fits you and the clothes you were wearing." Defendant also

challenges the truthfulness of this statement. In any event, that which had proceeded provided all the stage that was needed for that which followed. The trooper embarked doggedly on a campaign marked by (1) his insistence that defendant was not a criminal and did not have a criminal mind and (2) persistent offers "to help." Typical of that which was to occupy a good portion of the balance of this fifty-eight minute grilling was what then transpired:

T: Frank, I don't think you're a criminal. I don't think you're a criminal. I don't think you have a criminal mind. As a matter of fact, I know you don't have a criminal mind, because we've been talking now for a few hours together, haven't we?

D: Right.

T: Right

D: Yeah.

T: You don't have a criminal mind.

D: No.

T: I know you don't. But, like I noted before, we all have problems.

D: Right.

T: Am I right?

D: Yeah, you said this over there at the plant.

T: And you agree with me?

D: Yes, sir.

T: I have problems and you have.

D: Right.

T: Now, how do you solve a problem?

D: That depends on the problem.

T: Your problem, how do we solve it? How are we going to solve it?

D: This I don't know.

T: Do you want me to help you solve it?
D: Yeah.

T: You want me to extend all the help I can possibly give you, don't you?
D: Right.

T: Are you willing to do the same to me
D: Yeah.

T: Now, I feel . . .
D: Yeah.

T: . . . who is ever, whoever is responsible for this act . . .
D: Yeah.

T: He's not a criminal. Does not have a criminal mind. I think they have a problem.
D: Uh, huh.

T: Do you agree with me?
D: Yeah.

T: They have a problem.
D: Right.

T: A problem, and a good thing about that Frank, is a problem can be rectified.
D: Yeah.

T: I want to help you, I mean I really want to help you, but you know what they say, God helps those who help themselves, Frank.
D: Right.

T: We've got to get together on this. You know what I'm talking about, don't you?
D: Yeah, especially if they're trying to say that, you know, that like you say, I'm identified and my car's identified, and uh, we got to get together on this.

T: Yes we do. Now, that's only a few of the items. . .
D: Uh, huh.

T: . . . that we have now. Your problem, I'm not, let's forget this incident, okay . . .
D: Yeah.

T: . . . let's forget this incident, let's talk about your problem. *This is what, this is what I'm concerned with, Frank, your problem.*
D: Right.

T: If I had a problem like your problem, I would want you to help me with y problem.
D: Uh, huh.

T: Now, you know what I'm talking about.
D: Yeah.

T: And I know, and I think that, uh, a lot of other people know. You know what I'm talking about. *I don't think you're a criminal, Frank.*
D: *No, but you're trying to make me one.*

T: *No I'm not, no I'm not,* but I want you to talk to me so we can get this thing worked out. This is what I want, this is what I want, Frank. I mean it's all there, it's all there. I'm not saying. . .

The will-abrading grind continued:

D: If she [the victim] was to walk in here now, I wouldn't know, know that she was the girl that, uh, you're talking about.

T: But you were identified as being there talking to her minutes before she was . . . probably this thing that happened to her. How can you explain that?
D: I can't.

T: Why?
D: I don't know why, but I, I, you know, how can I explain something that I don't know anything about.
T: *Frank, look, you want, you want help, don't you Frank?*
D: *Yes, uh huh, yes, but yet I'm, I'm not going to admit to something that, that I wasn't involved in.*
T: *We don't want you to, all I want you to do is talk to me, that's all. I'm not talking about admitting to anything Frank.* I want you to talk to me. I want you to tell me what you think. I want you to tell me how you think about this, what you think about this?
D: What I think about it?
T: Yeah.
D: I think whoever did it really needs help.
T: And that's what I think and that's what I know. *They don't, they don't need punishment, right? Like you said, they need help.*
D: Right.
T: They don't need punishment. They need help, good medical help.
D: That's right.
T: . . . to rectify their problem. *Putting them in, in a prison isn't going to solve it, is it?*
D: No, sir. I know, I was in there for three and a half years.
T: That's right. That's the, that's not going to solve your problem is it?
D: No, you get no help down there. The only thing you learn is how to, you know. . .
T: Well, let's say this Frank, suppose you were the person who needed help. What would you want somebody to do for you?
D: Help me.

T: In what way?
D: In any way that they, they see, you know, fit, that it would help me.

The trooper induced defendant to say that whoever committed the deed probably had a mental problem. Then he asked defendant if he had ever been "examined." Upon being advised that he had been tested, the trooper then directed his energies to convincing defendant that he "might not be responsible for" his acts but that the blame was in others for their inability to help him.

T: Well, then did you still feel this way that something might happen it would be their fault because, *as far as I'm concerned if something did happen, it's not your fault, it's their fault. . .*
D: Right.

The trooper acknowledged that defendant was becoming "very, very nervous." The time had come.

T: Now listen to me Frank. This hurts me more than it hurts you, because I love people.
D: It can't hurt you anymore than it hurts me.
T: Okay, Listen Frank, I want you . . .
D: I mean even being involved in something like this.
T: Okay, listen Frank. If I promise to, you know, do all I can with the psychiatrist and everything, and we get the proper help for you, and get the proper help for you, will you talk to me about it?
D: I can't talk to you about something I'm not . . .
T: Alright, listen Frank, alright, honest. I know, I know what's going on inside you, Frank. I want to help you, you know, between us right now. I know what going on inside you. Frank, you've got to come forward and tell me that you want to help yourself. You've got to talk to me

about it. This is the only way we'll be able to work it out. I mean, you know, listen, I want to help you, because you are in my mind, you are not responsible. You are not responsible, Frank. Frank, what's the matter?

D: I feel bad.

T: Frank, listen to me, honest to God, I'm, I'm telling you, Frank, (inaudible). I know, it's going to bother you, Frank, it's going to bother you. It's there, it's not going to go away, it's there. It's right in front of you, Frank. Am I right or wrong?

D: Yeah.

T: You can see it Frank, you can feel it, you can feel it but you are not responsible. This is what I'm trying to tell you, but you've got to come forward and tell me. Don't, don't, don't let it eat you up, don't, don't fight it. You've got to rectify it, Frank. *We've got to get together on this thing, or I, mean really, you need help, you need proper help and you know it, my God, you know, in God's name you, you, you know it. You are not a criminal, you are not a criminal.*

That was enough. Defendant had been told in the name of God he was not a criminal.

D: Alright. Yes, I was over there and I talked to her about the cow and left. I left in my car and I stopped up on the road where, you know, where the cow had been and she followed me in her car . . .

Even the recitation of the details was interrupted with relentless and successful Svengalian efforts. At one point the trooper interjected, "Let it come out, Frank. I'm here, I'm here with you now. I'm on your side, I'm on your side, Frank. I'm your brother, you and I are brothers Frank. We are brothers, and I want to help my brother.

Defendant's continued insistence that despite his presence at the scene, he was not the killer could not long resist the tremendous psychological pressure.

T: You killed this girl didn't you?

D: No, I didn't.

T: Honest, Frank? It's got to come out. You can't leave it in. It's hard for you, I realize that, how hard it is, how difficult it is, I realize that, but you've got to help yourself before anybody else can help you. And we're going to see to it that you get the proper help. This is our job, Frank. This is our job. This is what I want to do.

D: By sending me back down there.

T: Wait a second now, don't talk about going back down there. First thing we have to do is let it all come out. Don't fight it because it's worse, Frank, it's worse. It's hurting me because I feel it. I feel it wanting to come out, but it's hurting me, Frank. You're my brother, I mean we're brothers. All men on this, all men on the face of this earth are brothers, Frank, but you got to be completely honest with me.

D: I'm trying to be, but you don't want to believe me.

T: I want to believe you, Frank, but I want you to tell me the truth, Frank, and you know what I'm talking about and I know what you're talking about. You've got to tell me the truth. I can't help you without the truth.

D: I'm telling you the truth. Sure, that's her blood in the car because when I seen the way she was cut I wanted to help her, and then when she fell over I got scared to even be involved in something like this, being on parole and . . .

T: I realize this, Frank, it may have been an accident. Isn't that possible, Frank? Isn't that possible?

D: Sure, it's possible.

T: Well, this is what I'm trying to bring out, Frank. It may be something that, that you did that you can't be held accountable for. This is, I can help you, I can help you once you tell me the truth. You know what I'm talking about. I want to help you, Frank. I like you. You've been honest with me. You've been sincere and I've been the same way with you. Now this is the kind of relationship we have, but I can't help you unless you tell me the complete truth. I'll listen to you. I understand, Frank. You have to believe that, I understand. I understand how you feel. I understand how much it must hurt you inside. I know how you feel because I feel it too. Because some day I may be in the same situation Frank, but you've got to help yourself. Tell me exactly what happened, tell me the truth, Frank, please.

D: I'm trying to tell you the truth.

T: Let me help you. It could have been an accident. You, you've got to tell me the truth, Frank. You know what I'm talking about. I can't help you without the truth. Now you know and I know that's, that's, that's all that counts, Frank. You know and I know that's what counts, that's what it's all about. We can't hide it from each other because we both know, but you've got to be willing to help yourself. You know, I don't think you're a criminal. You have this problem like we talked about before, right?

D: Yeah, you, you say this now, but this thing goes to court and everything and you . . .

T: No, listen to me, Frank, please listen to me. The issue now is what happened. The issue

now is truth. Truth is the issue now. You've got to believe this, and the truth prevails in the end, Frank. You have to believe that and I'm sincere when I'm saying it to you. You've got to be truthful with yourself.

D: Yeah, truth, you say in the end, right? That's why I done three and a half years for . . .

T: Wait, whoa . . . whoa

D: . . . for a crime that I never committed because of one stinkin detective framing me. . .

T: Frank, Frank.

D: . . . by the name of Rocco.

T: Frank, you, you're talking to me now. We have, we have a relationship, don't we? Have I been sincere with you, Frank? . . .

D: Yeah, you . . .

T: . . . Have I been honest?

D: . . . Yes.

T: Have I defined your problem, Frank? Have I been willing to help you? Have I stated I'm willing to help you all I can?

D: Yes.

T: Do I mean it?

D: Yes.

T: Whenever I talk to anybody I talk the same way, because you have a very, very serious problem, and we want to prevent anything in the future. This is what's important, Frank, not what happened in the past. It's right now, we're living now, Frank, we want to help you now. You've got a lot more, a lot more years to live.

D: No, I don't.

T: Yes, you do.

D: No, I don't.

T: Don't say you don't. Now you've got to tell me.
D: Not after all this, because this is going to kill my father.

T: Listen, Frank. There is where you, the truth comes out. Your father will understand. This is what you have to understand, Frank. If the truth is out he will understand. That's the most important thing, not, not what has happened, Frank. The fact that you were truthful, you came forward and you said, look I have a problem. I didn't mean to do what I did. I have a problem, this is what's important, Frank. This is very important. I got, I, I got to get closer to you, Frank, I got to make you believe this and I'm, and I'm sincere when I tell you this. You got to tell me exactly what happened, Frank. That's very important. I know how you feel inside, Frank, it's eating you up, am I right? It's eating you up, Frank. You've got to come forward. You've got to do it for yourself, for your family, for your father, this is what's important, the truth, Frank. Just tell me, you didn't mean to kill her did you?

Defendant's capitulation to the superior mind was complete:

D: I thought she was dead or I'd have never dropped her off like that.

"I mean, Frank," the trooper said, "this is hurting me, God listen. I just want you to come out and tell me, so I can help you, that's all."

At the end of the interrogation and before a written statement could be prepared, Frank Miller collapsed physically. In his testimony the trooper candidly described it as "a state of shock. • • • Mr. Miller had been sitting on a chair, had slid off of the chair on to the floor maintaining a blank stare on his face, staring straight ahead

and we were unable to get any type of verbal response from him at that time."

A first aid squad was contacted. Defendant was taken to a hospital.

Our concern for the treatment of defendant and the patent denial of due process is substantially tempered by our conviction of defendant's guilt. We now agonize over the necessity for giving an edge to one whom the police authorities reasonably, and very probably correctly, believed to be guilty of a most heinous crime, involving the greatest of all criminal wrongs, murder. But we have no doubt at all of our duty. An overbearing broadside which results in a confession by virtue of intense and mind bending psychological compulsion deserves no better fate at our hands than does the legendary rubber hose. *Chambers v. Florida*, 309 *U.S.* 227 (1940). We have long cherished a determination that the fair winds of due process shall blow upon the guilty as well as the innocent. We will not here let our gratitude for good police work which ferreted out one who is most probably a murderer, and our abhorrence at the crime he committed, cause us to abandon basic constitutional principles.

Thus, in the circumstances here, defendant's confession was involuntary in the constitutional sense and is inadmissible. The error in its admission requires a reversal and a new trial.

Broadly based as is our conclusion of law, we need not further wrestle with subordinate problems related to defendant's claims that the confession was the product of express promises of psychiatric help, such as that there were "strongly implied" promises of an insanity defense and no prison sentence, that the police lied to defendant in order to obtain the confession and so forth. Our determination also makes it unnecessary for us to decide many other issues raised on the appeal.

For guidance of the court below on the retrial, however, we report that on the record before us we do not agree with defendant that the evidence relating to the

events and colloquy at the plastics factory should have been excluded because of the absence of *Miranda* warnings.

We also acknowledge (only so it may not be thought to have been overlooked) defendant's complaint with respect to the refusal of the trial judge to charge manslaughter. We will not here speculate with respect to the nature of the testimony and evidence which will be adduced at the new trial. Any request to charge properly brought should, of course, be considered, as we are certain it will be. It is axiomatic that whether any requested charge should be given depends on the facts concerning which there is an issue.

Defendant personally filed a *pro se* brief. In it he launches still another attack on the "key man" jury selection system and on the allegedly discriminatory nature of jury selection in his case. Beyond the lack of support anywhere in the record for the claim of discriminatory jury selection, the arguments are frivolous. The challenge to the jurors' oath and that which alleges grand jury misconduct is equally frivolous and sham. Finally, defendant claims his counsel was inadequate and ineffective, particularly prior to trial. The argument is without merit.

Reversed and remanded for a new trial.

OPINION OF THE NEW JERSEY SUPREME COURT

SUPREME COURT OF NEW JERSEY

STATE OF NEW JERSEY, PLAINTIFF-PETITIONER

v.

FRANK M. MILLER, JR., DEFENDANT-RESPONDENT

Argued January 25, 1977—Reargued March 7, 1978—
Decided May 24, 1978

Ms. Marianne Espinosa, Designated Counsel, argued the cause for petitioner (*Mr. Peter N. Gilbreth*, Deputy Attorney General, of counsel; *Ms. Espinosa* and *Mr. Gilbreth* on the briefs; *Mr. John J. Degnan*, Attorney General of New Jersey, attorney).

Mr. E. Neal Zimmermann, Designated Counsel, argued the cause for respondent (*Mr. Stanley C. Van Ness*, Public Defender, attorney).

The opinion of the court was delivery by

SULLIVAN, J. Defendant was indicted for the murder of Deborah S. Margolin, a 17-year old girl, was tried by jury and found guilty of murder in the first degree. He was sentenced to life imprisonment in State Prison. The principal evidence against him was his oral statement, recorded on tape, made while he was being questioned at police barracks, in which he admitted killing the girl. On appeal, the Appellate Division, in an unreported opinion, reversed the conviction on the ground that defendant's

confession was involuntary in the constitutional sense. This Court granted certification of the State's petition. 70 *N.J.* 141 (1976).

The essential facts are as follows: On the morning of August 13, 1973 Deborah Margolin, 17 years of age, was sunbathing on the patio of her parents' farmhouse in East Amwell Township, Hunterdon County. She was wearing a two-piece bathing suit at the time. While she was there a white car drove up to the house and the driver sounded the car's horn several times. The girl's brothers, Daniel and Bernard, from upstairs windows in the house, observed a dusty white vehicle with two severe dents in its right side and its trunk lid tied shut. The male driver wore loose fitting clothes and "looked like a factory worker." Daniel heard the man tell Deborah that a heifer was loose down at the bottom of the driveway. The girl told her brother that she didn't need any help, got into a family car and drove down the driveway. She was never seen alive again.

Later that afternoon when the girl failed to return home, a search of the area was made and Deborah's body was found face down in a stream. Her throat had been slashed, severing her windpipe and jugular vein. The girl was nude except for a part of her bathing suit around her waist. Stab and cutting wounds had been inflicted in her pelvic area and vagina. Her high breast had been cut.

The description of the car in the driveway given to the police directed immediate attention to defendant who was then on parole from a 1969 conviction of carnal abuse and who had been arrested on July 10, 1973 on another morals charge. The arresting officer in that case, who was also participating in the investigation of the Deborah Margolin homicide, noted that the description of the car seen in the Margolin driveway was similar to the one owned by defendant. Miller's appearance also conformed with the description of the driver of that car given by one of the brothers.

Two police officers located defendant at approximately 10:50 p.m. that same day and interviewed him at a plastics factory in Flemington where he was employed. After some conversation during which defendant gave the officers permission to examine his car which was parked there, defendant agreed to accompany the officers to the Flemington police barracks for further questioning. They arrived at the barracks at about 11:49 p.m. The questioning began about two hours later and lasted for about 58 minutes. The interview was tape recorded.

Defendant initially was read his *Miranda* rights and expressed his willingness to talk without an attorney being present. However, he asked for and was given reassurance of his right to stop at any time and remain silent. Defendant then signed and dated a *Miranda* rights card. In the beginning defendant denied any involvement in the episode at the Margolin farmhouse and the girl's subsequent death. However, he was confronted with time discrepancies in his story as to his whereabouts at the time. The officer pointed out that the description of the vehicle seen in the Margolin driveway matched defendant's car to a "T" and that the inspection of defendant's car in the parking lot of the plastics factory disclosed fresh blood in the front seat. The officer said that the description of the driver of the car fitted defendant and the clothes he was wearing. Despite this, defendant continued to insist that he never talked to the girl and that he was not going to admit to something that he "wasn't involved in."

The conversation then got around to the subject of the mental condition of the person who had committed the crime. Defendant said that "whoever did it really needs help." The officer suggested that such a person was not really a criminal who should be punished, but rather needed medical treatment. The officer said he would do all he could to help defendant but that defendant had to help himself first by talking about it.

Finally, the defendant admitted that he was the person who drove up the Margolin driveway and spoke to

the girl about the cow. He said that he had driven back to where he had seen the cow, with the girl following him in her car. They started walking through the fields, when, according to defendant, he heard the girl scream, he turned and saw a man with a knife cutting the girl. Defendant said he tried to help the girl but the man cut him with the knife and ran away. Defendant put the girl in his car but panicked because he thought she was dead and when he got to a bridge over a stream he "dropped her off" the bridge into the stream.

The officer said that defendant was not being completely honest with him stating "you killed this girl didn't you?" When the defendant answered "No I didn't" the officer repeated, "You've got to tell me the truth. I can't help you without the truth." Defendant's reply was

> I'm telling you the truth. Sure, that's her blood in the car because when I seen the way she was cut I wanted to help her, and then when she fell over I got scared to even be involved in something like this, being on parole . . .

The officer persisted that truth was the issue, and truth would prevail in the end. He urged defendant "to be truthful with yourself." Defendant began to waiver in his denial, saying, "This is going to kill my father." Seizing on the reference to his father, the officer said

> [i]f the truth is out, he will understand. That's the most important thing, not what has happened, Frank. The fact that you were truthful, you came forward and you say, look I have a problem. I didn't mean to do what I did. I have a problem. This is what's important, Frank.

Defendant then confessed. He said that when they were unable to find the cow, the girl got into his car to go down the road to see if the cow was there. They drove down by the bridge where defendant took a penknife from his pocket and started cutting the girl. Defendant said he had no real recollection of just what he did to the girl or why, although he remembered throwing her body off the bridge. After the incident defendant said he drove home and, using a hose, washed the blood from the seat of the car. In answer to the officer's inquiry, defendant indicated he would be willing to give a formal statement.

Shortly after the questioning was terminated, defendant appeared to go into a state of shock. He slid off the chair onto the floor and had a blank stare on his face. When he did not respond to questions, he was taken to the Hunterdon Medical Center.

The tape recording was the principal evidence against defendant at his trial. It was admitted into evidence over defendant's objection and following a *voir dire* hearing at which defendant testified that he remembered going to the barracks for questioning but had no recollection of his interrogation, as recorded on the tape. According to defendant, the first thing he remembered after being in the barracks' coffee room was when he came to in the medical center.

The trial judge attached no particular significance to defendant's lack of present recollection of the taped interview. He found the questioning not to have been improper or coercive and that defendant's statement was voluntary and admissible. At the conclusion of the State's case, defendant elected not to take the stand and testify in his own defense.

During the trial an incident took place which defendant claimed also prejudiced his right to a fair trial. Because of the nature of the crime, 16 persons were chosen to hear the case pursuant to *R.* 1:8-2(d). The rule is intended to insure a sufficient number of jurors to render a verdict should a juror die or become ill, disabled or otherwise disqualified from continuing to sit. The rule is particularly useful in a protracted trial where the loss

of a juror would otherwise require a mistrial. The rule then provided as follows: [1]

> (d) Alternate Jurors: Civil and Criminal Actions. The court in its discretion may direct the impanelling of a jury of such number as is appropriate under the circumstances not to exceed 16, having the same qualifications and impanelled and sworn in the same manner as a jury of 12. If a juror is excused after he has been sworn but before any opening statement is begun, another juror may be impanelled and sworn to take his place. All the jurors shall sit and hear the case, but the court for good cause shown may excuse any of them from service provided the number of jurors is not reduced to less than 12 or 6 as the case may be or such other number as may be stipulated to. If more than such number are left on the jury at the conclusion of the court's charge, the clerk of the court in its presence shall put their names on slips folded to conceal the names, shall place the slips in a suitable box and from it shall draw such number of names as will reduce the jury to the number required to determine the issues. Following the drawing of the names of jurors to determine the issues, the court may in its discretion order that the alternate jurors not be discharged, in which event the alternate jurors shall be sequestered apart from the other jurors and shall be subject to the same orders and instructions of the court, with respect to sequestration and other matters, as the other jurors. If the alternate jurors are not discharged and if at any time after submission of the case to the jury, a juror dies or a juror is discharged by the court because he is ill or otherwise unable to continue, the court may direct the clerk to draw the name of an alternate juror to take the

[1] Effective September 6, 1977 the rule was amended to eliminate the phrase "not to exceed 16" in the fourth line of the rule.

> place of the juror who is deceased or discharged. When such a substitution of an alternate juror is made, the court shall give the jury such supplemental instructions as may be appropriate.

In the instant case, at the conclusion of the trial, the names of 12 of the 16 jurors were drawn to constitute the jury.[2] However, the court did not discharge the remaining four jurors. Pursuant to the rule, it directed that they be sequestered apart from the other jurors to be available if needed to replace one of the 12 jurors chosen.

After the jury had been deliberating for about an hour and a quarter, it sent a note asking the court "to clarify the definition between first and second degree murder." The jury was recalled and recharged on the distinction between the two degrees of murder, the court to a large extent repeating verbatim the language of its original charge.

Just after the court finished its supplemental instructions and asked the jury to retire to continue its deliberations, and before the jury left the jury box, juror number 11 asked to be dismissed from the jury as he was too nervous and that it was affecting his judgment. In answer to an inquiry by the court the juror said that he did not think he could render a fair verdict.

At the sidebar conference, the prosecutor suggested that the juror be excused and one of the alternate jurors be chosen to take his place. Counsel for defendant stated that he could "hardly object to the withdrawal of a juror who says he can't reach a fair and impartial verdict." However, he opposed substituting a juror after the jury had retired to deliberate. He said that the only remedy was to declare a mistrial.

The court discharged juror number 11 from the panel and had the clerk, by lot, draw the name of one of the

[2] Under the rule, the proper procedure should have been to reduce the number of jurors to 12 by selecting 4 alternates. No prejudice resulted from this procedural error.

alternate jurors to take the place of the discharged juror. The court then told the jury that it would have to "start over" in its deliberations. About 50 minutes later the jury reported that it had agreed on a verdict. In open court it then returned a verdict finding defendant guilty of murder in the first degree.

The Appellate Division reversed the conviction on the grounds that defendant's confession was the result of intense and mind-bending psychological compulsion and should have been excluded from evidence as involuntary in the constitutional sense. The Appellate Division expressed its "conviction of defendant's guilt" and its "abhorrence at the crime he committed." Nevertheless, it held that the guilty as well as the innocent were entitled to due process and that the use of defendant's confession at his trial required a reversal and a new trial.

We have no quarrel with the legal principles expressed by the Appellate Division. We disagree, though, with its evaluation of the techniques and tactics used by the officer who questioned defendant, as well as its conclusion that defendant's confession was involuntary in the constitutional sense.

Every case must turn on its particular facts. In determining the issue of voluntariness, and whether a suspect's will has been overborne, a court should assess the totality of all the surrounding circumstances. It should consider the characteristics of the suspect and the details of the interrogation. Some of the relevant factors include the suspect's age, education and intelligence, advice as to constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature and whether physical punishment or mental exhaustion was involved. *Schneckloth v. Bustamonte*, 412 *U.S.* 218, 226, 93 *S. Ct.* 2041, 2047, 36 *L. Ed.* 2d 854, 862 (1973). A suspect's previous encounters with the law has been mentioned as an additional relevant factor. *State v. Puchalski*, 45 N.J. 97, 101 (1965). Here defendant was a mature man 32 years of age, with some

high school education, who had previous experiences with the law. In its finding of voluntariness the trial court emphasized that defendant was "quite familiar" with his *Miranda* rights. There was no indication of low grade or subnormal intelligence on defendant's part. He was oriented, alert and responsive.

The tape recording shows that defendant was advised of his *Miranda* rights and had expressed his willingness to talk to the officer without having an attorney present but first sought and obtained reassurance that he could stop at any time and remain silent. The officer then proceeded to prod defendant about time discrepancies in his story as to his whereabouts at the time the girl left her house. He was reminded of evidence that linked him and his car to the incident. As the trial court noted, an interrogating police officer is not limited to asking a suspect if he committed the crime and if he receives a negative answer, that must be the end of the questioning.

There is a natural reluctance on the part of a suspect to admit to the commission of a crime and furnish details. See *State v. Smith*, 32 *N.J.* 501, 550 (1960), *cert.* denied, 364 *U.S.* 936, 81 *S. Ct.* 383, 5 *L. Ed.* 2d 367 (1961). Efforts by an interrogating officer to dissipate this reluctance and persuade the person to talk are proper as long as the will of the suspect is not overborne. As we said in *Smith*, *supra*, 32 *N.J.* at 550,

> An interrogation, no matter how conscientiously conducted, is naturally bound to be a tense occasion and to evoke apprehension, nervousness and a sense of pressure, no matter what the situation, which will be heightened in a person who knows he is guilty by consciousness of guilt and fear of the legal penalty. It must be recognized that it is not this kind of normal stress, fear and pressure which can make the questioning unfair and a confession involuntary.

The inquiry is whether an interrogating officer can appeal to a suspect by telling him that he is the sus-

pect's friend and wants to help him—that whoever killed this girl is not a criminal who should be punished, but a person who needs medical treatment. Does the officer have the right to tell the suspect that he must help himself first by telling the truth and then the officer will do what he can to help the suspect with his problem?

It must be conceded that this technique moves into a shadowy area and if carried to excess in time and persistence, can cross that intangible line and become improper. Here, though, the questioning lasted for just less than an hour. While there is an indication that defendant was becoming distressed near the end, this would be a normal reaction as the enormity of what defendant had done was being brought home to him. Defendant had expressed the fear that "this is going to kill my father." Defendant's collapse shortly after completion of his interrogation was the culmination of this realization.

It is evident from the record in this case that the officer's remarks had no appreciable impact on defendant and certainly did not contribute to an "overbearing of his will." Defendant, as previously noted, had been arrested on previous occasions and had a prior conviction for which he had been imprisoned. He was in no way deluded or misled into believing that the state trooper was acting in any capacity other than as an interrogating police officer in the investigation of a serious crime. Miller was fully aware that a murder had been committed which was the subject of the investigation and that he was a prime suspect in the killing. He well knew that should the investigation prove successful and were he to confess he would be charged with the commission of the crime. He was certainly cognizant of the fact that he would be handled through the criminal judicial system and, if found guilty, he would be punished accordingly. There is no basis for concluding that Miller did not have this complete understanding of his situation throughout his interrogation and confession.

Before it can be admitted into evidence and submitted to a jury, a defendant's confession must be proven by

the State to be voluntary beyond a reasonable doubt. *State v. Kelly*, 61 *N.J.* 283, 294 (1972). A confession which is the product of physical or psychological coercion must be considered to be involuntary and inadmissible in evidence regardless of its truth or falsity. However, we disagree with the Appellate Division's suggestion that the use of a psychologically-oriented technique in questioning a suspect is inherently coercive. Questioning of a suspect almost necessarily involves the use of psychological factors. Appealing to a person's sense of decency and urging him to tell the truth for his own sake are applications of psychological principles. Use of a psychiatrically-oriented technique is not improper merely because it causes a suspect to change his mind and confess. The real issue is whether the change of mind was voluntary and not an overbearing of the suspect's will.

We find that the interrogation in this case did not exceed proper bounds and that the voluntariness of defendant's confession could properly have been determined by the trial court to be established beyond a reasonable doubt. It was, therefore, properly admitted into evidence. In this connection, we reject defendant's related contentions that his confession was the product of strongly implied promises of an insanity defense and no prison sentence if defendant confessed as having no substantial basis in the record. The same for the contention that the confession was the product of trickery and lies by the police.

We next consider defendant's argument that *R.* 1:8-2(d) is unconstitutional insofar as it permits an alternate juror to be substituted for an original juror after jury deliberations have begun. The contention is that substitution of a juror at this stage of the proceeding infringes on a defendant's right to trial by jury. We considered this question in 1972 when the particular amendment to the rule was proposed. Our adoption of the amendment, effective September 5, 1972, was based on the conclusion that no constitutional obstacle was presented.

Nevertheless, the matter is not completely free from question. In *People v. Ryan*, 19 *N.Y.* 2d 100, 278 *N.Y.S.* 2d 199, 224 *N.E.* 2d 710 (Ct. App. 1966) the New York Court of Appeals struck down a similar provision in the New York Code of Criminal Procedure as violative of the right of trial by jury provided by the New York Constitution. The court held that substituting a juror after deliberations had begun was in effect bringing a 13th juror into the deliberations and that it offended the constitutional provision.

At the opposite pole is *People v. Collins*, 17 *Cal.* 3d 687, 131 *Cal. Rptr.* 782, 552 *P.* 2d 742 (Sup. Ct. 1976), *cert.* denied, 429 *U.S.* 1077, 97 *S. Ct.* 820, 50 *L. Ed.* 2d 796 (1977), where the Supreme Court of California upheld a provision of the Penal Code which provided for substitution of an alternate for an original juror after jury deliberations had begun. The court found this to be constitutionally permissible and not in violation of the right of trial by jury, provided good cause was shown, and the jury was instructed to begin deliberations anew.

The Federal Rule of Criminal Procedure, Rule 24(c), while providing for alternate jurors, permits substitution for regular jurors only prior to the time the jury retires to consider its verdict. However, it has been suggested that this rule be amended "to cover the situation where a juror becomes incapacitated during deliberations or is excused for some other reason." 8A *Moore's Federal Practice*, ¶ 24.05, page 24-36. The Advisory Committee on Rules of Practice and Procedures of the Judicial Conferences of the United States has proposed a change in Rule 24(c) so as to permit alternate juror substitution after jury deliberation has begun.

We find that Rule 1:8-2(d) in providing that for good cause shown, an alternate juror may be substituted for a regular juror after deliberations have begun, does not offend our constitutional guaranty of trial by jury. Certainly good cause appeared when the juror in question stated that in his then nervous and emotional condition,

he did not think he could render a fair verdict. Of course, when an alternate juror is so substituted, the jury must be instructed in clear and unequivocal terms that it is to begin its deliberations anew and that, as the trial judge stated herein, "you are in effect going to have to start over."

The rule is discretionary with the trial court because a situation might arise where it would be unwise to utilize this procedure. The longer the period of time the jury deliberates, the greater is the possibility of prejudice should a juror be substituted or replaced. However, in the circumstances presented herein we find that utilization of the rule provision was not improper. See *State v. Trent*, 157 *N.J. Super.* 231 (App. Div. 1978).

No rule is immutable. The court is always receptive to improvements in our procedures. See *In re National Broadcasting Corporation*, 64 *N.J.* 476 (1974). If it appears that an existing rule, although constitutional, creates trial problems, attention should be given to its continued usefulness. Our Civil and Criminal Practice Committees might well reassess the present utility of this amendment in the light of our five and one-half years experience with it.

A further contention made by defendant is that even though the 1972 rule amendment be held to be constitutional, the trial court committed error, after it replaced juror number 11 with an alternate juror, in not having its supplemental charge read to the substitute juror. It seems to be undisputed that when the supplemental charge was given to the jury as to the distinction "between first and second degree murder," the alternate jurors were not present in the courtroom and did not hear the supplemental charge.

The alternate jurors should have been brought into the courtroom to hear such charge. Rule 1:8-2(d) provides that if alternate jurors are not discharged following selection of the jury, they are to be sequestered apart from

the other jurors but are subject "to the same orders and instructions of the court, • • • as the other jurors."

However, we conclude that defendant was not prejudiced by the failure to comply with the rule. The original charge to the entire jury panel including the alternate jurors was an adequate and correct instruction as to the difference between the two degrees of murder. The supplemental charge, to a great extent, repeated, almost verbatim, the original instructions. The entire jury was told that if it needed clarification of any part of the court's charge, it should submit a written request to the court. After the alternate juror was seated no request for clarification was made so that it must be assumed that this juror did not need further instructions. In the circumstances, we find no reversible error.

We have considered defendant's additional contention that there should have been a charge on manslaughter. The point is frivolous. There is nothing in the record to support the submission of such an issue to the jury. See *State v. Artis*, 57 *N.J.* 24, 30 (1970).

The judgment of the Appellate Division is reversed and the judgment of conviction, including the sentence imposed, is hereby reinstated.

CONFORD, P. J. A. D. (temporarily assigned), dissenting. I am constrained to dissent from the Court's reversal of the Appellate Division judgment in this case. My grounds are two: (1) the unanimous determination of the Appellate Division that the confession obtained from defendant was extracted from him by means that denied him due process was sound; and (2) the circumstances attending the substitution of a juror during the deliberations of the jury denied the defendant his right to an untainted jury trial. For either or both of these reasons the verdict of guilt should be set aside and the defendant granted a new trial.

I

I address the confession issue first. It goes without saying that it is not easy for a judge to render an adjudication that results in the vacation of the conviction of an apparently guilty person—especially where the crime is as reprehensible as this one. It is evident from the Appellate Division opinion that that court felt the pressure of the same considerations. But no principle of legal jurisprudence is better settled in this country or more self-evident than that the price of faithful enforcement by the judiciary of the constitutional rights of individuals embedded in the Bill of Rights may on occasion be the setting free or the enforced retrial of a malefactor. Only a year ago Justice Stewart, in a case comparable to the instant one in its tension between the demands of law enforcement and those of vindication of individual constitutional rights, felt moved to say, in expressing the reasons of the Supreme Court for vacating a conviction:

> The pressures on state executive and judicial officers charged with the administration of the criminal law are great, especially when the crime is murder and the victim a small child. But it is precisely the predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all.
>
> *Brewer v. Williams*, 430 *U.S.* 387, 406, 97 *S. Ct.* 1232, 1243, 51 *L. Ed.* 424 (1977).

Previously, in a confession case, Chief Justice Warren had said:

> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can

be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

Spano v. New York, 360 *U.S.* 315, 320-321, 79 *S. Ct.* 1202, 1206, 3 *L. Ed.* 2d 1265 (1959). See also *Mapp v. Ohio*, 367 *U.S.* 643, 659, 81 *S. Ct.* 1684, 6 *L. Ed.* 2d 1081 (1961); *Olmstead v. United States*, 277 *U.S.* 438, 485, 48 *S. Ct.* 564, 72 *L. Ed.* 944 (1928) (Justice Brandeis, dissenting).

This Court has been equally faithful to these high principles. In *State v. Macri*, 39 *N.J.* 250, 266 (1963), Justice Jacobs stated:

> State judges, no less than federal judges, have the high responsibility of protecting constitutional rights. While they, no less than law enforcement officers, are disturbed when the guilty occasionally go unpunished, they tolerate that as the incidental cost of insuring the continued effectiveness of the guaranties afforded by the Constitution to all of us free men.

All members of this Court, each conscientiously voting his own views on the merits of this troublesome issue, are bound at least to realize that an affirmance of the conviction in this case signals to the law-enforcement community that the method of interrogation of this defendant resulting in the confession before us is unexceptionable and may be freely practiced. I cannot join in such a signal.

All members of the Court agree that an involuntary confession—one extracted from a suspect by physical or psychological coercion on the part of the police—cannot be used in a trial of the suspect, as a matter of his right not to be deprived of his liberty without due process. *Brown v. Mississippi*, 297 *U.S.* 278, 56 *S. Ct.* 461, 80 *L. Ed.* 682 (1936); *McCormick on Evidence* (1972) § 149, p. 317. Although the cases recognize that no single test of involuntariness can be formulated, the essence of

the controlling rationale is found in the statement in *Culombe v. Connecticut*, 367 *U.S.* 568, 602, 81 *S. Ct.* 1860, 1879, 6 *L. Ed.* 2d 1037 (1961):

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. • • • The line of distinction is that at which governing self-direction is lost, and compulsion, of whatever nature or however infused, propels or helps to propel the confession.

Another view of the matter, drawing from earlier cases, was reformulated in *Malloy v. Hogan*, 378 *U.S.* 1, 7, 84 *S. Ct.* 1489, 1493, 12 *L. Ed.* 2d 653 (1964), where the Court said:

> • • • the constitutional inquiry is not whether the conduct of state officers in obtaining the confession is shocking, but whether the confession was 'free and voluntary: that is [i]t must not be extracted by any sort of threat or violence, *nor obtained by any direct or implied promises, however, slight*, nor by the exertion of any improper influence • • •.' (emphasis added).

In *Miranda v. Arizona*, 384 *U.S.* 436, 448, 86 *S. Ct.* 1602, 1614, 16 *L. Ed.* 2d 694 (1966), the Court noted:

> • • • we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. • • • this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.

No two cases are alike; all must be decided on the totality of the circumstances. But ultimately "neither the body nor mind of an accused may be twisted until he breaks." *Culombe v. Connecticut, supra*, 367 *U.S.* at 584, 81 *S. Ct.* at 869.

Of importance to a resolution of this appeal is an understanding of the burden of proof of the State to establish the voluntariness of an impugned confession and of the scope of review by an appellate court on such an issue. This Court has plainly established the burden of proof on the State as that of providing voluntariness of a confession beyond a reasonable doubt. *State v. Yough*, 49 *N.J.* 587, 601 (1967); *State v. Kelly*, 61 *N.J.* 283, 294 (1972). As to scope of appellate review, since the issue is of constitutional dimension and is one of mixed fact-law, the reviewing court conducts a sweeping surveillance of the question practically the equivalent of *de novo* redetermination.[1] *Beckwith v. United States*, 425 *U.S.* 341, 348, 96 *S. Ct.* 1612, 48 *L. Ed.* 2d 1 (1976); *Spano v. New York, supra*, 360 *U.S.* at 316, 79 *S. Ct.* 1202 (1959); *State v. Contursi*, 44 *N.J.* 422, 428, n. 2 (1965); *State v. Smith*, 32 *N.J.* 501, 544, 549 (1960), *cert.* den. 364 *U.S.* 936, 81 *S. Ct.* 383, 5 *L. Ed.* 2d 367 (1961), and see *State v. Johnson*, 42 *N.J.* 146, 160, n. 2 (1964).

In view of the foregoing, and the circumstances that all subordinate facts relating to the voluntariness of this confession were essentially uncontested (the court had available the verbatim transcript of a taping of the entire interrogation at the police station), the Appellate Division had the ultimate responsibility of determining independently for itself whether the State had carried its

[1] If there are contested issues as to subordinate facts involving credibility of witnesses, deference may be accorded any fact-findings thereon by the trial judge. See *State v. Bowden*, 62 *N. J. Super.* 339, 349 (App. Div.) certif. den. *sub nom. State v. Duffy*, 33 *N. J.* 385 (1960).

burden of establishing *beyond a reasonable doubt* that the confession was voluntary, *i.e.*, that "neither the body nor mind" of Miller was "twisted until he [broke]." *Culombe v. Connecticut, supra*, 367 *U. S.* at 584, 81 *S. Ct.* at 1860. That the Appellate Division cannot fairly be said to have erred in finding that the State did not meet its burden is best demonstrated by setting forth its opinion substantially in its entirety, as follows:

> "PER CURIAM
>
> "Defendant was convicted by a jury of murder in the first degree. He appeals on a number of grounds. The principal one of these is a challenge to the voluntariness of a confession.
>
> "We are extraordinarily fortunate in having before us the transcript of a tape recording made during the interrogation which led to the confession. This obviates any need to speculate with respect to that which transpired. Operating, then, from this unique vantage point, we first declare our allegiance to the 'decent' hope that a guilty man may stub his toe. *State v. McKnight*, 52 *N.J.* 35, 52 (1968). Then we deplore the techniques and tactics which extracted this confession and which, in our judgment, denied defendant due process of the law.
>
> "A *Miranda* (*Miranda v. Arizona*, 384 *U.S.* 436 [86 *S. Ct.* 1602, 16 *L. Ed.* 2d 694] (1966)) *voir dire* was held. Thereafter the judge found, in findings adequately supported by credible evidence in the whole record (*State v. Johnson*, 42 *N.J.* 146 (1964)), that *Miranda* warnings were given and in a timely manner. Then the trial judge, recognizing the 'only real problem' as being one of 'whether or not there was any cajolery, inducement, combination thereof that overcame the will of the defendant so that his subsequent answers to the several questions were not, "voluntary",' and relying upon the definition of 'voluntary' found in *Schneckloth v. Bustamonte*, 412 U.S.

218 [93 *S. Ct.* 2041, 36 *L. Ed.* 2d 854] (1973), determined the confession to be admissible. He said,

I don't think there was any trickery either apparent or inferable in this statement. The most that can be said as [defense counsel] has indicated a promise of help. There is no question that is in the statement, but I do not find that promise was such as to cause this confession to be inadmissible and therefore it will be received in evidence subject to certain deletions about which we should talk now I presume.

"We are clearly persuaded of error in this determination.

"The tape transcript must be read in its entirety for its full aroma to be savored. The interrogation began (at two o'clock in the morning) gently enough with a recitation of an earlier discussion between the interrogating trooper and defendant at the latter's place of work. It prodded defendant (almost kindly; the trooper continually addressed defendant both patronizingly and by his first name) about his whereabouts and activities on the previous day. Then a minor discrepancy in defendant's timetable arose. The trooper pressed his advantage, again gently. 'Okay, now,' he told defendant, 'this is a problem.' Defendant said, 'I realize this . . .'

"Then the trooper pointed out the defendant's vehicle had some damage, some red clay or dirt, and [1]

T: There was blood found on the left front interior portion of your vehicle, tonight, fresh blood.
D: Fresh blood?
T: Yes, sir. This is very, very serious.
D: I realize this.
T: That's point 3. • • •

[1] In transcript quotations hereafter, 'T:' signifies the question or comment from the trooper, and 'D:' signifies defendant's response. Emphasis in any of the quotations which follow from the tape transcript is, of course, added.

"Then came the first significant police statement, assertedly untrue because as defendant graphically points out in his brief, 'no evidence at all of this crucial fact was presented at trial.'

T: We have a witness, Frank, now this is point 4. We have a witness who identified your car, who, no, I'm, I'm sorry, let me, I shouldn't say your car, who identified a vehicle that fits the description of your car, at this girl's home, speaking with her, telling her something about a cow being loose. Someone who was there who wanted to help her, they didn't want to hurt this girl, they didn't want to hurt this girl, Frank, they wanted to help her. You see, I know this, I know that, . . .
D: Yeah.

"If this was untrue, what followed immediately thereafter was obviously designed to capitalize on the chicane:

T: . . . because I can appreciate that, because I would have done the same thing. If there was something to be rectified, or if somebody had a problem, I would have done the same thing. I would have wanted to help her. The vehicle that came onto the property . . .
D: Right.
T: . . . fits the description of your vehicle.
D: It does.
T: Yes. Now, that's the fourth point. And when I say fits the description, what I mean, Frank, is it fits the description to a 't', and as we talked about before, how many other vehicles are there like yours in the County right now?
D: There shouldn't be too many, if any . . .

T: If any . .
D: . . . because of the damage on the right-hand side.

T: Now, what would your conclusion be under those circumstances, if someone told you that?
D: I'd probably, uh, have the same conclusion you got.

T: Which is what?
D: That I'm the guy that, that did this.

T: That did what?
D: Committed this crime.

"The trooper then told defendant that 'we have a physical description • • • from another witness' which 'fits you and the clothes you were wearing.' Defendant also challenges the truthfulness of this statement. In any event, that which had proceeded provided all the stage that was needed for that which followed. The trooper embarked doggedly on a campaign marked by (1) his insistence that defendant was not a criminal and did not have a criminal mind and (2) persistent offers 'to help.' Typical of that which was to occupy a good portion of the balance of this fifty-eight minute grilling was what then transpired:

T: Frank, I don't think you're a criminal. I don't think you're a criminal. I don't think you have a criminal mind. As a matter of fact, I know you don't have a criminal mind, because we've been talking now for a few hours together, haven't we?
D: Right:

T: Right?
D: Yeah.

T: You don't have a criminal mind.
D: No.

T: I know you don't. But, like I noted before, we all have problems.
D: Right.

T: Am I right?
D: Yeah, you said this over there at the plant.

T: And you agree with me?
D: Yes, sir.

T: I have problems and you have.
D: Right.

T: Now, how do you solve a problem?
D: That depends on the problem.

T: Your problem, how do we solve it? How are we going to solve it?
D: This I don't know.

T: Do you want me to help you solve it?
D: Yeah.

T: You want me to extend all the help I can possibly give you, don't you?
D: Right.

T: Are you willing to do the same to me?
D: Yeah.

T: Now, I feel . . .
D: Yeah.

T: . . . who is ever, whoever is responsible for this act . . .
D: Yeah.

T: He's not a criminal. Does not have a criminal mind. I think they have a problem.
D: Uh, huh.

T: Do you agree with me?
D: Yeah.

T: They have a problem.
D: Right.

T: A problem, and a good thing about that Frank, is a problem can be rectified.

D: Yeah.

T: I want to help you, I mean I really want to help you, but you know what they say. God helps those who help themselves, Frank.

D: Right.

T: We've got to get together on this. You know what I'm talking about, don't you?

D: Yeah, especially if they're trying to say that, you know, that like you say, I'm identified and my car's identified, and uh, we got to get together on this.

T: Yes we do. Now, that's only a few of the items . . .

D: Uh, huh.

T: . . . that we have now. Your problem, I'm not, let's forget this incident, okay . . .

D: Yeah.

T: . . . let's forget this incident, let's talk about your problem. *This is what, this is what I'm concerned with, Frank, your problem.*

D: Right.

T: If I had a problem like your problem, I would want you to help me with my problem.

D: Uh, huh.

T: Now, you know what I'm talking about.

D: Yeah.

T: And I know, and I think that, uh, a lot of other people know. You know what I'm talking about. *I don't think you're a criminal, Frank.*

D: *No, but you're trying to make me one.*

T: *No I'm not, no I'm not,* but I want you to talk to me so we can get this thing worked out. This is what I want, this is what I want, Frank. I

mean it's all there, it's all there. I'm not saying . . .

"The will-abrading grind continued:

D: If she [the victim] was to walk in here now, I wouldn't know, know that she was the girl that, uh, you're talking about.

T: But you were identified as being there talking to her minutes before she was . . . probably this thing that happened to her. How can you explain that?

D: I can't.

T: Why?

D: I don't know why, but I, I, you know, how can I explain something that I don't know anything about.

T: *Frank, look, you want, you want help, don't you Frank?*

D: *Yes, uh huh, but yet I'm, I'm not going to admit to something that, that I wasn't involved in.*

T: *We don't want you to, all I want you to do is talk to me, that's all. I'm not talking about admitting to anything Frank.* I want you to talk to me. I want you to tell me what you think. I want you to tell me how you think about this, what you think about this?

D: What I think about it?

T: Yeah.

D: I think whoever did it really needs help.

T: And that's what I think and that's what I know. *They don't, they don't need punishment, right? Like you said, they need help.*

D: Right.

T: They don't need punishment. They need help, good medical help.

D: That's right.

T: . . . to rectify their problem. *Putting them in, in a prison isn't going to solve it, is it?*

D: No, sir. I know, I was in there for three and a half years.

T: That's right. That's the, that's not going to solve your problem is it?

D: No, you get no help down there. The only thing you learn is how to, you know . . .

T: Well, let's say this Frank, suppose you were the person who needed help. What would you want somebody to do for you?

D: Help me.

T: In what way?

D: In any way that they, they see, you know, fit, that it would help me.

"The trooper induced defendant to say that whoever committed the deed probably had a mental problem. Then he asked defendant if he had ever been "examined." Upon being advised that he had been tested, the trooper then directed his energies to convincing defendant that he 'might not be responsible for' his acts but that the blame was in others for their inability to help him.

T: Well, then did you still feel this way that something might happen it would be their fault because, *as far as I'm concerned if something did happen, it's not your fault*, its their fault . . .

D: Right.

"The trooper acknowledged that defendant was becoming 'very, very nervous.' The time had come.

T: Now listen to me Frank. This hurts me more than it hurts you, because I love people.

D: It can't hurt you anymore than it hurts me.

T: Okay, listen Frank, I want you . . .

D: I mean even being involved in something like this.

T: Okay, listen Frank. If I promise to, you know, do all I can with the psychiatrist and everything, and we get the proper help for you, and get the proper help for you, will you talk to me about it?

D: I can't talk to you about something I'm not . . .

T: Alright, listen Frank, alright, honest. I know, I know what's going on inside you, Frank. I want to help you, you know, between us right now. I know what going on inside you. Frank, you've got to come forward and tell me that you want to help yourself. You've got to talk to me about it. This is the only way we'll be able to work it out. I mean, you know, listen, I want to help you are in my mind, you are not responsible. You are not responsible, Frank. Frank, what's the matter?

D: I feel bad.

T: Frank, listen to me, honest to God, I'm, I'm telling you, Frank, (inaudible). I know, it's going to bother you, Frank, it's going to bother you. It's there, it's not going to go away, it's there. It's right in front of you, Frank. Am I right or wrong?

D: Yeah.

T: You can see it Frank, you can feel it, you can feel it but you are not responsible. This is what I'm trying to tell you, but you've got to come forward and tell me. Don't, don't, don't let it eat you up, don't fight it. You've got to rectify it. Frank. *We've got to get together on this thing, or I, I mean really, you need help, you need proper help and you know it, my God, you know, in God's name you, you, you know it. You are not a criminal, you are not a criminal.*

"That was enough. Defendant had been told in the name of God he was not a criminal.

D: Alright. Yes, I was over there and I talked to her about the cow and left. I left in my car and I stopped up on the road where, you know, where the cow had been and she followed me in her car . . .

"Even the recitation of the details was interrupted with relentless and successful Svengalian efforts. At one point the trooper interjected, 'Let it come out, Frank. I'm here, I'm here with you now. I'm on your side, I'm on your side, Frank. I'm your brother, you and I are brothers Frank. We are brothers, and I want to help my brother.'

"Defendant's continued insistence that despite his presence at the scene, he was not the killer could not long resist the tremendous psychological pressure.

T: You killed this girl didn't you?
D: No, I didn't.

T: Honest, Frank? It's got to come out. You can't leave it in. It's hard for you. I realize that, how hard it is, how difficult it is, I realize that, but you've got to help yourself before anybody else can help you. And we're going to see to it that you get the proper help. This is our job, Frank. This is our job. This is what I want to do.

D: By sending me back down there.

T: Wait a second now, don't talk about going back down there. First thing we have to do is let it all come out. Don't fight it because it's worse, Frank, it's wor[illegible]t's hurting me because I feel it. I feel it wanting to come out, but it's hurting me, Frank. You're my brother, I mean we're brothers. All men on this, all men on the face of this earth are brothers, Frank, but you got to be completely honest with me.

D: I'm trying to be, but you don't want to believe me.

T: I want to believe you, Frank, but I want you to tell me the truth, Frank, and you know what I'm talking about and I know what you're talking about. You've got to tell me the truth. I can't help you without the truth.

D: I'm telling you the truth. Sure, that's her blood in the car because when I seen the way she was cut I wanted to help her, and then when she fell over I got scared to even be involved in something like this, being on parole and . . .

T: I realize this, Frank, it may have been an accident. Isn't that possible, Frank? Isn't that possible?

D: Sure, it's possible.

T: Well, this is what I'm trying to bring out, Frank. It may be something that, that you did that you can't be held accountable for. This is, I can help you, I can help you once you tell me the truth. You know what I'm talking about. I want to help you, Frank. I like you. You've been honest with me. You've been sincere and I've been the same way with you. Now this is the kind of relationship we have, but I can't help you unless you tell me the complete truth. I'll listen to you. I understand, Frank. You have to believe that, I understand. I understand how you feel. I understand how much it must hurt you inside. I know how you feel because I feel it too. Because some day I may be in the same situation Frank, but you've got to help yourself. Tell me exactly what happened; tell me the truth, Frank, please.

D: I'm trying to tell you the truth.

T: Let me help you. It could have been an accident. You, you've got to tell me the truth, Frank. You

know what I'm talking about. I can't help you without the truth. Now you know and I know that's, that's, that's all that counts, Frank. You know and I know that's what counts, that's what it's all about. We can't hide it from each other because we both know, but you've got to be willing to help yourself. You know, I don't think you're a criminal. You have this problem like we talked about before, right?

D: Yeah, you, you say this now, but this thing goes to court and everything and you . . .

T: No, listen to me, Frank, please listen to me. The issue now is what happened. The issue now is truth. Truth is the issue now. You've got to believe this, and the truth prevails in the end, Frank. You have to believe that and I'm sincere when I'm saying it to you. You've got to be truthful with yourself.

D: Yeah, truth, you say in the end, right? That's why I done three and a half years for . . .

T: Wait, whoa . . . whoa

D: . . . for a crime that I never committed because of one stinkin detective framing me. . .

T: Frank, Frank.

D: . . . by the name of Rocco.

T: Frank, you, you're talking to me now. We have, we have a relationship, don't we? Have I been sincere with you, Frank?

D: Yeah, you . . .

T: . . . Have I been honest?

D: . . . Yes

T: Have I defined your problem, Frank? Have I been willing to help you? Have I stated I'm willing to help you all I can?

D: Yes.

T: Do I mean it?

D: Yes.

T: Whenever I talk to anybody, I talk the same way, because you have a very, very serious problem, and we want to prevent anything in the future. This is what's important, Frank, not what happened in the past. It's right now, we're living now, Frank, we want to help you now. You've got a lot more, a lot more years to live.

D: No, I don't.

T: Yes, you do.

D: No, I don't.

T: Don't say you don't. Now you've got to tell me.

D: Not after all this, because this is going to kill my father.

T: Listen, Frank. There is where you, the truth comes out. Your father will understand. This is what you have to understand, Frank. If the truth is out he will understand. That's the most important thing, not, not what has happened, Frank. The fact that you were truthful, you came forward and you said, look I have a problem. I didn't mean to do what I did. I have a problem, this is what's important, Frank. This is very important, I got, I, I got to get closer to you, Frank, I got to make you believe this and I'm, and I'm sincere when I tell you this. You got to tell me exactly what happened, Frank. That's very important. I know how you feel inside, Frank, it's eating you up, am I right? It's eating you up, Frank. You've got to come forward. You've got to do it for yourself, for your family, for your father, this is what's important, the truth, Frank. Just tell me, you didn't mean to kill her did you?

"Defendant's capitulation to the superior mind was complete:

D: I thought she was dead or I'd have never dropped her off like that.

"'I mean, Frank,' the trooper said, 'this is hurting me, God listen. I just want you to come out and tell me, so I can help you, that's all.'

"At the end of the interrogation and before a written statement could be prepared, Frank Miller collapsed physically. In his testimony the trooper candidly described it as 'a state of shock. • • • Mr. Miller had been sitting on a chair, had slid off of the chair on to the floor maintaining a blank stare on his face, staring straight ahead and we were unable to get any type of verbal response from him at that time.'

"A first aid squad was contacted. Defendant was taken to a hospital.

"Our concern for the treatment of defendant and the patent denial of due process is substantially tempered by our conviction of defendant's guilt. We now agonize over the necessity for giving an edge to one whom the police authorities reasonably, and very probably correctly, believed to be guilty of a most heinous crime, involving the greatest of all criminal wrongs, murder. But we have no doubt at all of our duty. An overbearing broadside which results in a confession by virtue of intense and mind bending psychological compulsion deserves no better fate at our hands than does the legendary rubber hose. *Chambers v. Florida*, 309 *U.S.* 227 (60 *S. Ct.* 472, 84 *L. Ed.* 716] (1940). We have long cherished a determination that the fair winds of due process shall blow upon the guilty as well as the innocent. We will not here let our gratitude for good police work which ferreted out one who is most probably a murderer, and our abhorrence at the crime he committed, cause us to abandon basic constitutional principles.

"Thus, in the circumstances here, defendant's confession was involuntary in the constitutional sense and is inadmissible. The error in its admission requires a reversal and a new trial.

"Broadly based as is our conclusion of law, we need not further wrestle with subordinate problems related to defendant's claims that the confession was the product of express promises of psychiatric help, such as that there were 'strongly implied' promises of an insanity defense and no prison sentence, that the police lied to defendant in order to obtain the confession and so forth. Our determination also makes it unnecessary for us to decide many other issues raised on the appeal.

• • • •

"Reversed and remanded for a new trial."

I find myself in full accord with the foregoing opinion and its characterization of the trooper's tactics as constituting "[a]n overbearing broadside which result[ed] in a confession by virtue of intense and mind bending psychological compulsion." An aspect of this psychological compulsion which at the same time constitutes an independently sufficient basis for a finding of involuntariness consists of the repeated promises made to the defendant by the trooper that defendant would receive the psychiatric help he needed, not punishment, and that he would not be imprisoned ("that's [prison[(sic) is not going to solve your problem, is it?") because he was not a "criminal," but only had a "problem," impliedly a mental one; society, not defendant, was at fault because it had not properly treated him in prior institutionalization. See the quotation from *Malloy v. Hogan*, *supra*, at p. 411 above (378 *U.S.* at 7, 84 *S. Ct.* 1489); *State v. Smith*, *supra*, 32 *N.J.* at 542; *State v. Cole*, 136 *N.J. L.* 606, 611 (E. & A. 1947).

While length of time and place of interrogation are conditions bearing upon the totality of circumstances to

which consideration must be given, and it is true that only the last hour of the confrontation was at a State police station, this episode had been immediately preceded by almost an hour of interrogation at defendant's work place and about two hours of detention at the police station in the early morning hours. But the significant thing here is that only a small part of the taped episode was interrogation in any legitimately investigative sense. For the most part, it was plainly, bluntly and persistently an effort to break the will of the defendant. The tactic was an appeal to his emotions and his need for medical help and the misleadingly comforting assurances of the trooper, as defendant's "brother," hypnotically reiterated at length, that he was not a "criminal" requiring imprisonment and that he must unburden himself as a prelude to the "help" which would be provided by the State to assuage his "problem." *Cf. Leyra v. Denno*, 347 *U.S.* 556, 560-561, 74 *S. Ct.* 716, 98 *L. Ed.* 948 (1954): and see *Miranda v. Arizona*, *supra*, 384 *U.S.* at 450, 86 *S. Ct.* 1602. The total physical collapse of the defendant at the end, after repeated earlier assurances by defendant to the trooper that he was not involved in the crime, cogently evidences the effect of the trooper's blandishments on defendant's mind and emotions. A will resolved not to confess was coerced into one to do just that.

The opinion of the Appellate Division notes that "[t]he tape transcript must be read in its entirety for its full aroma to be savored." The members of this Court have not only read the transcript but listened to the entire tape. The experience, to me, corroborates the impression of the Appellate Division as to the gentleness of the commencement of the colloquy, but it also communicates the inception and gradual increase of a tone of urgency, insistence and pressure in the trooper's voice as he bears down on his subject. If the sole object of police interrogation is detection and procurement of evidence of crime the trooper cannot be faulted. But if the values underlying the privilege against self-incrimination in a civilized so-

ciety still live, as assuredly they do, see *State v. Deatore*, 70 *N.J.* 100 (1976); *McCormick on Evidence*, *op. cit.*, *supra*, at p. 315, they may not be eroded by judicial solicitude for the affirmance of a conviction of an apparently guilty person at the expense of a dispassionate evaluation of a contention that a confession was extracted from a defendant by overbearing his free will. In my judgment, the State has fallen far short of its obligation to establish beyond a reasonable doubt (if at all) that that did not happen in the case of this defendant. If I am right, the conviction must be reversed on that ground *per se*. *Chapman v. California*, 386 *U.S.* 18, 23, 87 *S. Ct.* 824, 17 *L. Ed.* 2d 705 (1967).

Although not strictly material to the issue before us, there is a substantial possibility that even were defendant acquitted because of the inadmissibility of the confession, he could be committed civilly under *R.* 4:74-7 in view of his prior mental history, the circumstances in the instant case pointing to his implication in this murder and the "preponderance-of-the evidence" rule applicable in commitment law, as distinguished from that of "beyond a reasonable doubt" in criminal cases. See *State v. Krol*, 68 *N.J.* 236, 257 (1965). Accordingly, the alternative potentialities facing the Court in determining this matter are not necessarily confined to affirming the conviction or setting the defendant free.[2]

II

The circumstances attending the substitution of an alternate juror during the deliberations of the jury are recounted in Justice Sullivan's opinion for the Court. In my view, the practice rule, *R.* 1:8-2(d), is not facially invalid, but is susceptible of unconstitutional application, as I believe occurred in this instance.

It is obvious that if a jury which renders a verdict has consulted with one not a juror in the course of its de-

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[2] I here assume, as is not at all certain, that defendant could not be convicted at a retrial without use of the confession.

liberations that verdict is tainted by the potential influence in the ultimate verdict of the participation of the stranger in the deliberations. In principle, the instant situation cannot be differentiated from that just posed. Eleven of the jurors who concurred in the verdict were subject for an hour and a half to the views, opinions and influence of the juror subsequently excused. In effect, he was a 13th juror. See *People v. Ryan*, 19 *N.Y.* 2d 100, 278 *N.Y.S.* 2d 199, 224 *N. E.* 2d 710 (Ct. Ap. 1966); A.B.A. *Standards Relating to Trial by Jury* (Approved Draft 1968) § 2.7 at 81-83. But see *People v. Collins*, 17 *Cal.* 3d 687, 131 *Cal. Rptr.* 782, 552 *P.* 2d 742 (Sup. Ct. 1976), *cert.* den. 429 *U.S.* 1077, 97 *S. Ct.* 820, 50 *L. Ed.* 2d 796 (1977). Indeed, those eleven jurors were exposed to the influence of the discharged juror for a substantially longer period of time than their deliberations with the substituted juror. Moreover, the substituted juror had not been exposed to the deliberations, views and influence of the eleven jurors mutually expressed and exerted before he came upon the scene.

In the present circumstances, an admonition to a jury that they forget what happened before and start their deliberations anew with the substituted juror cannot excise the taint of an ultimate verdict in respect of the two objections cited above.

I have indicated that I do not believe the practice rule to be facially invalid. By this I mean that if a juror had to be excused at a very early stage in the deliberations the trial judge could exercise his discretion as to whether the period elapsed was so short that, upon instructions to the reconstituted jury to begin deliberations entirely anew, the extraneous factors would become *de minimis* and the right of jury trial substantially untrammeled. Possibly, also, original deliberations, although extended beyond the very early stages, prior to substitution of a juror, could be held constitutionally harmless on motion for a new trial or on appeal if the deliberations of the reconstituted jury went on for many times the period

prior to substitution. Such a situation might have been presented here if the jury deliberations after the substitution and prior to the verdict had extended for a period of days.

I regard the practical utility of the practice rule to warrant saving it from a declaration of facial invalidity. However, fidelity to the constitutional right of jury trial impels me to hold the rule unconstitutional as here applied, for the reasons stated above.

I agree with the Court's disposition of the question raised by defendant concerning the failure to read the supplemental charge to the substituted juror.

I would affirm the judgment of the Appellate Division.

HALPERN, P. J. A. D. (temporarily assigned), dissenting. I am in complete accord with Judge Conford's dissent that defendant's confession was involuntary and, therefore, join him in Point I.

I also agree with Judge Conford that if *R.* 1:8-2(d) is facially valid[1] it was unconstitutionally applied in this case. However, as I have strong reservations as to its facial validity, I deem it advisable to supplement Judge Conford's views on this subject without discussing the conflict which exists in other jurisdictions referred to by the majority and Judge Conford in their opinions.

It is essential that we note at the outset that *N. J. S. A.* 2A:74-2, and its predecessor statutes, permitted a trial judge, in his discretion, to impanel a jury not to exceed 14, in civil and criminal cases, and for "good cause" excuse any of them from service provided the number was not reduced to less than 12. At the end of his charge, a method of selecting 12 to decide the case was provided. No provision is made in the statute for substituting a juror after deliberations had commenced. When the statute was finally amended in 1975 (after this case had been completed), insofar as it has any bearing here, the only

[1] In view of our conclusion that the confession was invalid it is unnecessary to pass upon the facial validity of *R.* 1:8-2(d).

change made was to increase the eligible number of alternate jurors to such number as the trial judge deemed appropriate. It is *R.* 1:8-2(d) which was in effect when the instant case was tried. The Rule authorized a trial judge, in his discretion, to substitute an alternate after submission of the case to the jury if "• • • a juror dies or a juror is discharged • • • because he is ill or otherwise unable to continue • • •."[2]

If *R.* 1:8-2(d) made no provision for substitution of jurors after the jury's deliberations had commenced, as is the case in the federal courts, it unquestionably would be facially valid.[3] The statute and *R.* 1:8-2(d) were undoubtedly adopted as a practical method to avoid the danger of a mistrial through death, illness or incapacity of a juror to continue as well as to preserve the time, efforts and expenses of the court, the attorneys, the litigants and all others involved in a protracted trial. The constitutionality of the statute was upheld in *State v. Dolbow*, 117 *N.J. L.* 560, 564 (E. & A. 1937), appeal dismissed 301 *U.S.* 669, 57 *S. Ct.* 943, 81 *L. Ed.* 1334 (1937). Until the jury retires to deliberate on its verdict, if there is good cause to excuse a juror, no statute or rule of law is violated, nor is there any conceivable prejudice to a defendant or the State. However, once the jury begins deliberations and an alternate is substituted

[2] The issue of whether the rule is invalid because it deals with substantive law rather than practice and procedure, was not raised or argued and need not be decided. See *Winberry v. Salisbury*, 5 *N. J.* 240 (1950), *cert. den.* 340 *U. S.* 877, 71 *S. Ct.* 123, 95 *L. Ed.* 638 (1950).

[3] *Fed. R. Crim. P.* 24(c) provides that once a case is submitted to the jury alternates must be discharged. It is significant that a proposal had been made that the federal rules be amended to allow for a substitution procedure. However, after being submitted to the Supreme Court for comment, the Court questioned the committee as to whether it was satisfied as to the constitutionality of such provision, and the proposal was withdrawn. See, Orfield, "Trial Jurors in Federal Criminal Cases," 29 *F. R. D.* 43, 46 (1962).

the possibilities of prejudice resulting are unlimited. As an example, we need consider only what happened in the instant case in addition to the deficiency found to exist by Judge Conford.

Following the trial judge's charge, the 12 jurors were chosen (improperly, but not prejudicially, as indicated in the majority opinion), sworn and retired to deliberate. The trial judge then had two court attendants sworn to guard the four alternates. He explained to the alternates why they were to be sequestered and said "• • • we will take you upstairs and we will have to keep you up there without talking to anyone until the deliberations have been concluded."[4] Significantly, he failed to instruct them not to discuss the case with each other. We would be naive to believe that at a time when the alternates thought they probably would have no further connection with the case they did not express their personal views on the guilt or innocence of defendant and the possible verdict to be rendered. Therefore, I am convinced that when the alternate became a member of the panel of 12, he brought with him the views of the other three alternates. As indicated, we have no way of knowing what went on during the original jury's deliberations, or what was discussed when the alternate joined them. It is the danger of contamination which must be guarded against and which is to be condemned as a denial of due process when we are required to speculate if a verdict is tainted. In my view, defendant in this case was tried by either 13 or 16 jurors contrary to *N.J. Const.* (1947), Art. 1, par. 9 and *R.* 1:8-2(d). When an individual's freedom is at stake, a court should not be required to speculate whether he received a fair trial in accordance with law and due process.

Another problem which deserves our considered judgment, since the issue involved is novel, is whether the

[4] At the outset of the trial, before any testimony was taken, the trial judge instructed the jury not to discuss the testimony among themselves until after he had charged the jury.

circumstances surrounding the trial judge's decision to excuse the juror were sufficiently compelling to justify his action. The only colloquy that ensued between the juror who was excused and the trial judge follows:

> JUROR NUMBER 11: Question. May I be dismissed from this jury because I appear to be too nervous and nervousness is affecting my judgment of this case? I want to be honest. Except I am nervous, I have to be honest. It is affecting my judgment and if you don't mind, I would like to be replaced with someone.
>
> THE COURT: Don't you think you can render a fair verdict?
>
> JUROR NUMBER 11: No, I don't.

When a juror seeks to be excused after deliberations have begun, it is the trial judge's duty to exert every reasonable effort to avoid the consequences that would necessarily flow from a granting of the request. The trial judge must make careful inquiry into the substance of the request. Admittedly, he must approach the issue with extreme caution and delicacy to avoid a mistrial or tainting the jury's deliberations. Normally, such inquiry would be made out of the jury's presence, but in the presence of all counsel and defendant. See the discussion concerning the extent to which the trial judge should examine the juror's reasons for wanting to be excused. *State v. Trent*, 157 *N.J. Super.* 231 (App. Div. 1978). Here, the juror's reason for asking to be excused was "* * * I appear to be too nervous and nervousness is affecting my judgment * * * and if you don't mind, I would like to be replaced with someone." The trial judge asked only one question before excusing him "Don't you think you can render a fair verdict?"

It is my view when the request was made compelling circumstances did not exist for excusing the juror, and that defense counsel's motion for a mistrial, based on the existing record, should have been granted. I assume every

juror in a murder case is concerned and nervous to some degree, but that does not warrant excusing him from his sworn duty. Should we be compelled to speculate why and to what extent this juror suddenly became nervous after a four-day trial and about 90 minutes of deliberation? Must a trial judge accept his bald statement that he is nervous and wants to be replaced? No judge should have to do so because of the many speculative reasons that come quickly to mind. As an example only, he alone may have wanted to acquit or convict defendant and his fellow jurors took a contrary position and were pressuring him to adopt their views. Certainly, if this were the fact, excusing him would be unwarranted. Or, could it be one of the deficiencies of *R.* 1:8-2(d) that a juror, knowing that alternates were waiting in the wings, took what he considered an easy way out? Or, perhaps, the other 11 jurors suggested it to him. In short, since we must speculate as to his reason, the trial judge's action in excusing him under the existing circumstances was a mistaken exercise of discretion.

Finally, I am unable to agree that error did not result from the failure of the alternate juror to hear the supplemental charge. The majority admits the alternate jurors should have been brought into the courtroom to hear the supplemental charge, but decide that no prejudice resulted.

The difference between first and second degree murder, and the elements to be proven in connection therewith, are probably the most important parts of the charge. In reality, it is the most difficult part of the charge for the jury to understand. The trial judge in charging the jury on this subject utilized verbatim the suggested charge prepared by the Supreme Court's Committee on Model Jury Charges. The transcript of this portion of the charge consists of six typewritten pages in the record. In contrast, in answering the jury's inquiry that he "clarify the definition between first and second degree murder" he merely excerpted portions of his original charge (about

two and one-half transcribed pages) and suggested if they needed additional clarification to ask for it.

I know of no case in the annals of the law, nor have any been brought to my attention, where absent a waiver a verdict was held valid if all the jurors rendering the verdict did not hear the trial judge's entire instructions. No sound reason is presented which should impel us to adopt a new principle of law, and discard what has been a principle of justice so deeply rooted as to be deemed a fundamental and required practice, when to do so is based on pure conjecture. The trial judge's deliberate failure to repeat his supplemental charge to the alternate, in the face of the requirement of *R.* 1:8-2(d), defense counsel's request for him to do so and the denial of the motion for a mistrial, deprived defendant of a fair trial and due process of law.

Accordingly, for the reasons expressed, I would reverse the conviction and order a new trial.

PASHMAN, J., dissenting and concurring in part. I am convinced that this defendant's confession was involuntary and join in Point I of Judge Conford's dissent.

I conclude that *R.* 1:8-2 (d), providing for the substitution of an alternate juror for a regular juror after deliberations have begun, is constitutionally valid on its face. So long as the members of the original jury are specifically instructed to begin deliberations anew when a substitution is made, the defendant is not prejudiced, and the spectre of a mistrial at such a late stage is avoided. It should be noted that the judicial economics made possible by this procedure will redound to the benefit of numerous defendants whose cases will not be put off by the unnecessary retrial of a time-consuming case. Thus, I concur in the conclusion of the majority, see *ante* at 405-406 on this point.

However, I am unable to accept the premise that the failure of the alternate juror to hear a recharge differentiating first and second degree murder was harmless.

All jurors—both deliberating and alternate—must hear the same orders and instructions of the court. I join in Judge Halpern's dissent, see *ante* at 431-432 on this point.

For reversal and reinstatement of conviction—Justices SULLIVAN, CLIFFORD, SCHREIBER and HANDLER—4.

For affirmance—Justice PASHMAN and Judges CONFORD and HALPERN—3.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 82-1175 (JWB)

FRANK M. MILLER, JR., PETITIONER

v.

PETER J. FENTON, ETC., ET AL., RESPONDENTS

REPORT AND RECOMMENDATION

Frank M. Miller, who has been convicted of the murder of a 17-year old girl and is now confined for life, petitions for habeas corpus under 28 U.S.C. § 2254. On direct appeal the Appellate Division, in an unreported decision, reversed, holding that petitioner's confession was involuntary. The Supreme Court of New Jersey, however, granted the State's petition for certification and, in a four to three decision, reinstated the conviction.[1] *State v. Miller*, 76 N.J. 392, 423 (1978). On this application petitioner contends that "the method used to obtain [his] confession was coercive and violative of due process" because it was the result of "tremendous psychological pressure as well as express promises by the police of psychological help and implied promises of no prosecution or imprisonment" (Petition, ¶ 12).

The following facts, which are recited at 76 N.J. 396, 397, are not in dispute and under 28 U.S.C. § 2254(d) are "presumed to be correct":

> . . . On the morning of August 13, 1973, Deborah Margolin, 17 years of age, was sunbathing on the

[1] In opposing the State's application petitioner exhausted state remedies as required by 28 U.S.C. § 2254(b). *Picard v. Connor*, 404 U.S. 270 (1971).

patio of her parents' farmhouse in East Amwell Township, Hunterdon County. She was wearing a two-piece bathing suit at the time. While she was there a white car drove up to the house and the driver sounded the car's horn several times. The girl's brothers, Daniel and Bernard, from upstairs windows in the house, observed a dusty white vehicle with two severe dents in its right side and its trunk tied shut. The male driver wore loose fitting clothes and "looked like a factory worker." Daniel heard the man tell Deborah that a heifer was loose down at the bottom of the driveway. The girl told her brother that she didn't need any help, got into a family car and drove down the driveway. She was never seen alive again.

Later that afternoon when the girl failed to return home, a search of the area was made and Deborah's body was found face down in a stream. Her throat had been slashed, severing her windpipe and jugular vein. The girl was nude except for a part of her bathing suit around her waist. Stab and cutting wounds had been inflicted in her pelvic area and vagina. Her right breast had been cut.

The description of the car in the driveway given to the police directed immediate attention to [petitioner] who was then on parole from a 1969 conviction of carnal abuse and who had been arrested on July 10, 1973 on another morals charge. The arresting officer in that case, who was also participating in the investigation of the Deborah Margolin homicide, noted that the description of the car seen in the Margolin driveway was similar to the one owned by [petitioner]. [Petitioner's] appearance also conformed with the description of the driver of that car given by one of the brothers.

Two police officers located [petitioner] at approximately 10:50 p.m. that same day and interviewed him at a plastics factory in Flemington where he

> was employed. After some conversation during which [petitioner] gave the officers permission to examine his car which was parked there, [petitioner] agreed to accompany the officers to the Flemington police barracks for further questioning. They arrived at the barracks at about 11:45 p.m. The questioning began about two hours later and lasted for about 58 minutes . . .

To determine whether petitioner confessed because his will was overborne consideration must be given to *all relevant circumstances*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *United States v. Dickens*, 695 F.2d 765, 778 (3d Cir. 1982); *e.g.*, whether petitioner was advised of his *Miranda* [1a] rights, the duration and conditions of his detention, the length of the questioning itself, whether he was subjected to corporal punishment or mental duress, his age, education, intelligence and whether he had had previous experience with law enforcement officers. In this case there is no question petitioner, age 32, was advised of his *Miranda* rights; that having been so advised he spoke to the trooper who was interviewing him without invoking his right to an attorney; that in 1969 he was convicted of carnal abuse and sentenced to 12 to 15 years of which he had served 40 months before being paroled; [2] that he had attended high school for more than a year and was sufficiently intelligent to understand what was said to him and what he was doing; that he makes no claim that he was denied food, drink, sleep or ordinary amenity; and that during the interview,[3] which lasted

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[1a] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] Ex. R-11, p. 14.

[3] Prior to this interview petitioner had been questioned for about 40 minutes, while not in custody, in the parking lot of his place of employment and had then spent approximately two hours in the Flemington Police Barracks kitchen where he was in custody but not questioned.

58 minutes, he asked for and received reassurance that he could stop speaking. (Ex. R-4, p. 2).

The last mentioned inquiry and request for reassurance, coupled with petitioner's continuation of the interview, weighs heavily in determining whether he was aware of his right not to speak at all and of his right to stop speaking whenever he wished and, consequently, as to whether his will was overborne. Petitioner's awareness of his rights having been demonstrated and he, no novice to the criminal justice system, having elected to permit himself to be interviewed, the questioning evinced by Ex. R-4 was, without more, not unconstitutional. *Michigan v. Tucker*, 417 U.S. 433, 444-5 (1974).

Petitioner contends that a denial of due process is to be found in the psychological techniques used by the interrogating trooper. But this Court is not persuaded that in the petitioner's case the approach used was unconstitutional. *Cf.*, *Culombe v. Connecticut*, 367 U.S. 568 (1961), in which a 33-year old illiterate mental defective who had been classified as a moron was questioned intermittently from Saturday afternoon until Wednesday night and only confessed after he saw his wife and sick daughter; and *Leyra v. Denno*, 347 U.S. 556, 559-60 (1954), in which "petitioner was subjected to almost constant police questioning" for 23½ hours, following which he was permitted sleep for an hour and a half, while "suffering from an acutely painful attack of sinus" and was introduced to a police psychiatrist whom he expected to provide medical treatment but who "by subtle and suggestive questions simply continued the police effort of the past days and nights to induce petitioner to admit his guilt * * * [and in which] petitioner's answers indicate[d] a mind dazed and bewildered. Time after time the petitioner complained about how tired and how sleepy he was and how he could not think. . ."

Here there is no question that petitioner knew of his right not to speak. And while the interrogation was designed to elicit his responses it was not conducted under

circumstances which denied him due process. Put another way, the issue is not whether in retrospect petitioner would have confessed; it is whether his confession was involuntary because it was produced by conduct which compelled, rather than persuaded him to surrender his due process right to remain silent. (See p. 4, *supra*).

Considering all the relevant circumstances which obtained, in accordance with *Schneckloth v. Bustamonte*, *supra*,[4] and recognizing that a policeman is neither limited to a simple "Did you commit this crime?", nor permitted to interrogate for hours without permitting a suspect sleep, sustenance or amenity, the questioning of the petitioner did not exceed that constitutionally permitted.

It is noted that in the state court the prosecution was required to prove voluntariness of plaintiff's confession beyond a reasonable doubt; on this habeas corpus application, however, it is petitioner who carries the burden of proof, a burden which is not lightened by petitioner's testimony on *voir dire* that he did not remember any of the interrogation at issue here. (Ex. R-5, 2T106-19 to 116-11). *Brown v. Cuyler*, 669 F.2d 155, 158 (3d Cir. 1982).

In view of the foregoing this Court finds that petitioner has not demonstrated that his confession was unconstitutionally obtained[5] and accordingly recommends that this application be dismissed without evidentiary hearing,[6]

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[4] In that case, the Supreme Court concluded that a determination of voluntariness depended not "on the presence or absence of a single controlling criterion [but on] a careful scrutiny of all the surrounding circumstances." 412 U.S. at 226-7.

[5] *Cf., Procunier v. Atchley*, 400 U.S. 446 (1971).

[6] The following exhibits, all in *State v. Miller*, Hunterdon County Indictment No. 320-M-72, have been received:

R-1	Indictment
R-2	Tape, August 13, 1973
R-3	Tape, August 14, 1973
R-4	Transcript of R-3
R-5	Trial transcript (7 volumes)

[Continued]

Townsend v. Sain, 372 U.S. 293 (1963), but with a certificate of probable cause. 28 U.S.C. § 2253; *Alexander v. Harris*, 595 F.2d 87, 90 (2nd Cir. 1979).

Respectfully submitted,

/s/ John W. Devine
JOHN W. DEVINE
United States Magistrate

Dated: February 23, 1983

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[6] [Continued]

R-6	Judgment of Conviction
R-7	Petitioner's Notice of Appeal
R-8	Brief in support of R-7
R-9	Brief in opposition to R-7
R-10	Appellate Division decision
R-11	Petition for Certification
R-12	Reply to R-11
R-13	Order Granting Certification
R-14	State's Supplemental Brief
R-15	State's Supplemental Letter

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Chambers of
John W. Bissell
Judge

Federal Building
Trenton, New Jersey 08605

NOT FOR PUBLICATION

June 13, 1983.

[Filed Jun. 17, 1983]

Paul M. Klein, Esquire
Assistant Deputy Public Defender
State of New Jersey
Office of the Public Defender
Appellate Section
20 Evergreen Place (First Floor)
East Orange, N.J. 07018

Irwin I. Kimmelman, Esquire
Attorney General of the State of New Jersey
By: Daniel Louis Grossman, Esquire
Deputy Attorney General
Division of Criminal Justice
Appellate Section
Post Office Box CN-086
Trenton, N.J. 08625

LETTER-OPINION

Re: FRANK M. MILLER, JR., Petitioner v. PETER J. FENTON, etc., et al., Respondents; Civil Action No. 82-1175.

Gentlemen:

This matter comes before the Court pursuant to the petition of Frank M. Miller, Jr. for a writ of habeas corpus under 28 U.S.C. § 2254. On February 23, 1983, John W. Devine, United States Magistrate, issued to the

undersigned his Report and Recommendation, in which he recommended:

> . . . that this application be dismissed without evidentiary hearing, *Townsend v. Sain*, 372 U.S. 293 (1963), but with a certification of probable cause.

This Court has conducted its independent review of the record, including analyses of the opinions of the Supreme Court and Appellate Division of the Superior Court of the State of New Jersey. *See State v. Miller*, 76 N.J. 392 (1978), a four to three decision upholding the admissibility of Miller's confession, wherein both the majority and dissenting opinions are printed in full. This Court's independent review has also included listening to the ver batim tape recordings of petitioner's interrogation on August 13 and 14, 1973.

In objecting to Judge Devine's Report and Recommendation, petitioner's counsel argues that the Magistrate did not sufficiently address and consider the psychological impact of the interrogation pattern and technique in determining whether Mr. Miller's confession was voluntary.

This Court adopts in full Judge Devine's Report and Recommendation, a copy of which is annexed hereto and incorporated by reference. Supplementing that Report and Recommendation, this Court further determines as follows:

It is quite clear that Judge Devine understood (as does this Court) that the major basis of Miller's petition is his attack upon the psychological impact of the police interrogation. *See* annexed Report and Recommendation at 1, 5, *inter alia*. As indicated above, this Court has itself specifically reviewed the record to determine whether petitioner's confession was involuntary for, among other reasons, alleged "tremendous psychological pressure as well as expressed promises by police of psychological help and implied promises of no prosecution or imprisonment." (Petition, ¶ 12.) These very allegations were indeed the

focal point of the opinions expressed by the Courts of the State of New Jersey, *supra*. This Court, as well, determines that petitioner's due process rights were not violated. Petitioner's eventual confession, although indeed the result of psychologically oriented interrogation, was "the product of an essentially free and unconstrained choice", not the result of circumstances where "his will [had] been overborne and his capacity for self-determination critically impaired", *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961). *See also*, *State v. Miller*, *supra*, 76 N.J. 392, 404-05. In this respect, the tape-recorded interrogation and confession reveal that petitioner was fully oriented at all times and, although prodded by the interrogator's psychologically oriented technique, nevertheless eventually confessed because of his own realization and desire to tell the truth.

For the reasons set forth above, this Court determines that petitioner has not demonstrated that his confession was unconstitutionally obtained, and hereby dismisses the present application without evidentiary hearing but with a certificate of probable cause. 28 U.S.C. § 2253.

Very truly yours,

/s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

JWB/ebj
Att.

HON. JOSEPH H. RODRIGUEZ
Public Defender
Office of the Public Defender
20 Evergreen Place
East Orange, Newc Jersey 07018
(201) 648-3280

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 82-118

FRANK M. MILLER, JR., PETITIONER

vs.

PETER J. FENTON, ETC., ET AL., RESPONDENTS

[Filed July 15, 1983]

NOTICE OF APPEAL

NOTICE is hereby given that Frank M. Miller, Jr., petitioner above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the order of the United States District Judge John W. Bissell, dismissing Mr. Miller's Petition for Writ of Habeas Corpus and certifying probable cause for appeal, filed in this action on the 17th day of June, 1982.

Dated: July 14, 1983,

/s/ Paul M. Klein
PAUL M. KLEIN
Assistant Deputy
Public Defender

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5530

FRANK M. MILLER, JR., APPELLANT

v.

PETER J. FENTON, Superintendent,
Rahway State Prison,
IRWIN I. KIMMELMAN, Attorney General,
State of New Jersey, APPELLEES

On Appeal from the United States District Court
for the District of New Jersey

(D.C. Civ. No. 82-1175)

Argued January 24, 1984

Before: GIBBONS and BECKER, *Circuit Judges*, and ATKINS, *District Judge* *

(Filed August 17, 1984)

JOSEPH H. RODRIGUEZ
Public Defender
CLAUDIA VAN WYK (Argued)
PAUL M. KLEIN
Assistant Deputy Public Defenders
20 Evergreen Place, First Floor
East Orange, NJ 07018
Attorneys for Appellant

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* Honorable C. Clyde Atkins, United States District Judge for the Southern District of Florida, sitting by designation.

IRWIN I. KIMMELMAN
Attorney General
ARLENE R. WEISS (Argued)
Deputy Attorney General
Division of Criminal Justice
Appellate Section
Post Office Box CN086
Trenton, NJ 08625
Attorneys for Appellees

OPINION OF THE COURT

BECKER, *Circuit Judge.*

This is a habeas corpus case brought by Frank M. Miller, Jr., who was convicted in New Jersey state court of the murder of Deborah Margolin. In his habeas corpus petition, Miller alleges that his confession to the murder was involuntary, because the police detective's mode of questioning created psychological pressure that induced him to confess against his will. The New Jersey Supreme Court held that the record supported the trial court's conclusion that Miller's confession was "voluntary," and thus admissible under the controlling precedents. We have carefully reviewed the record and conclude that the factual findings of the state court are supported by the record. We therefore conclude that we must accord these findings the presumption of correctness provided for in 28 U.S.C. § 2254(d). *See Patterson v. Cuyler*, 729 F.2d 925 (3d Cir. 1984). Given the findings and the presumption, we cannot say as a matter of law that the mode of interrogation used by the detective who questioned Miller rendered the confession involuntary, and accordingly we will affirm the judgment of the district court denying Miller's application for the writ of habeas corpus.

I. *FACTS AND PROCEDURAL HISTORY*

On August 13, 1973, at about 11:30 a.m., while Deborah Margolin was sunbathing on the porch of her home in rural East Amwell Township, a stranger approached in an automobile and informed her that he had seen a heifer loose at the bottom of the driveway. The stranger offered to help her retrieve the cow. Ms. Margolin declined the offer of help, and then proceeded alone in her brother's automobile to retrieve the heifer. Her brother found the automobile about half an hour later; the keys had been left in the ignition.

When Ms. Margolin failed to return by late afternoon, her family commenced searching for her. Her father eventually found her dead, face down in a creek, with her throat and breast cut. The New Jersey State Police were then called. A number of troopers and detectives arrived on the scene at about 7:30 P.M., and took a description of the car and the stranger from the victim's brothers, who had seen him drive up. Miller, who lived nearby and was known to the troopers, had been convicted in 1969 of carnal abuse and arrested in 1973 for statutory rape. One of the officers, Trooper Scott, recalled that Miller drove a car that matched the one described by the victim's brothers—an old white car with the trunk tied shut and two dents in the side. Detective Boyce of the State Police confirmed the descriptions of the car and also concluded that the description of the stranger given by the victim's brothers matched Miller's general physical characteristics.

The police located Miller at his place of employment, P.F.D. Plastics in Trenton, at about 10:50 P.M. on the evening of the murder, and questioned him there. Miller agreed to accompany the officers to the police barracks for further questioning, and, without being searched, turned his penknife over to the officers. After spending about seventy-five minutes in the barracks kitchen with Trooper Scott, during which he was not questioned, Miller was taken into an interrogation room by Detective Boyce

and read his *Miranda* rights. Miller signed the *Miranda* card, and specifically asked Boyce for a clarification of his right to terminate questioning, which Boyce gave him.[1]

The state police made a tape recording of Miller's statement.[2] Boyce spoke in a soft and friendly—even sympathetic—voice. He thus presented himself as a "nice guy," friendly to the suspect and interested in solving his problems. In response to Boyce's questions, Miller first described his activities on the morning of August 13. Boyce then pointed out various discrepancies in Miller's story about how he passed the time during which the murder occurred, the similarity between the description of the car given by the victim's brothers and Miller's car, and other incriminating evidence. At that point, Miller weakened:

> BOYCE: Now, what would your conclusion be under those circumstances, if someone told you that?
> MILLER: I'd probably, uh, have the same conclusion you got.
> BOYCE: Which is what?
> MILLER: That I'm the guy that, that did this.
> BOYCE: That did what?
> MILLER: Committed this crime.

After this, Boyce shifted gears. Boyce stated that in his opinion, Miller wasn't a "criminal," and that he didn't have a "criminal mind." Rather, Boyce asserted that Miller had a "problem," for which he needed help, not punishment. Boyce then led Miller to talk about his need for help, the psychiatric treatment he received as

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[1] The adequacy of the *Miranda* warnings and waiver are not contested on appeal.

[2] We have listened to that tape, and have read the transcript as well (both are part of the record); hence, we are in a position to describe Detective Boyce's and Miller's mood and their relationship during the interrogation.

a condition of his parole from a prior conviction, and his recent statutory rape arrest.

With this background out on the table, Boyce began appealing to Miller's conscience:

B. Okay, listen Frank, if I promise to, you know, do all I can with the psychiatrist and everything, and we get the proper help for you, and get the proper help for you, will you talk to me about it?

M. I can't talk to you about something I'm not . . .

B. Alright, listen Frank, alright, honest. I know, I know what's going on inside you, Frank. I want to help you, you know, between us right now. I know what [sic] going on inside you. Frank, you've got to come forward and tell me that you want to help yourself. You've got to talk to me about it. This is the only way we'll be able to work it out. I mean, you know, listen, I want to help you, because you are in my mind, you are not responsible. You are not responsible, Frank, Frank, Frank, what's the matter?

M. I feel bad.

B. Frank, listen to me, honest to God, I'm, I'm telling you, Frank, (inaudible). I know, it's going to bother you, Frank, it's going to bother you. It's there, it's not going to go away, it's there. It's right in front of you, Frank. Am I right or wrong?

M. Yeah.

Miller then began, step by step, to make damaging admissions concerning his participation in the murder. At first, he insisted that, although he was with the victim when she was killed, some unknown stranger had actually committed the crime while they were searching for the heifer. Miller insisted that he had tried to get help, but that, when he realized the victim was dead, he

had panicked and dropped the body off. Boyce allowed this much to come out, but then challenged Miller, saying "[y]ou killed this girl, didn't you." Miller again denied having committed the crime, after which Boyce changed gears again, telling Miller—again in soft, pleading tones —that he could only be helped if he "told the truth"—admitted the crime. The following exchange then took place.

B. Honest, Frank? It's got to come out. You can't leave it in. It's hard for you, I realize that, how hard it is, how difficult it is, I realize that, but you've got to help yourself before anybody else can help you. And we're going to see to it that you get the proper help. This is our job, Frank. This is our job. This is what I want to do.

M. By sending me back down there.

B. Wait a second now, don't talk about going back down there. First thing we have to do is let it all come out. Don't fight it because it's worse, Frank, it's worse. It's hurting me because I feel it. I feel it wanting to come out, but it's hurting me, Frank. You're my brother, I mean we're brothers. All men on this, all men on the face of this earth are brothers, Frank, but you got to be completely honest with me.

M. I'm trying to be, but you don't want to believe me.

B. I want to believe you, Frank, but I want you to tell me the truth, Frank, and you know what I'm talking about and I know what you're talking about. You've got to tell me the truth. I can't help you without the truth.

M. I'm telling you the truth. Sure, that's her blood in the car because when I seen the way she was cut I wanted to help her, and then when she fell over I got scared to even be involved in something like this, being on parole and . . .

B. I realize this, Frank, it may have been an accident. Isn't that possible, Frank? Isn't that possible?

M. Sure, it's possible.

B. Well, this is what I'm trying to bring out, Frank. It may be something that, that you did that you can't be held accountable for. This is, I can help you, I can help you once you tell me the truth. You know what I'm talking about. I want to help you, Frank, I like you. You've been honest with me. You've been sincere and I've been the same way with you. Now this is the kind of relationship we have, but I can't help you unless you tell me the complete truth. I'll listen to you. I understand, Frank. You have to believe that, I understand. I understand how you feel. I understand how much it must hurt you inside. I know how you feel because I feel it too. Because some day I may be in the same situation Frank, but you've got to help yourself. Tell me exactly what happened, tell me the truth, Frank, please.

M. I'm trying to tell you the truth.

B. Let me help you. It could have been an accident. You, you've got to tell me the truth, Frank. You know what I'm talking about. I can't help without the truth. Now you know and I know that's, that's, that's all that counts Frank. You know and I know that's what counts, that's what it's all about. We can't hide it from each other because we both know, but you've got to be willing to help yourself. You know, I don't think you're a criminal. You have this problem like we talked about before, right?

M. Yeah, you, you say this now, but this thing goes to court and everything and you . . .

B. No, listen to me, Frank, please listen to me. The issue now is what happened. The issue now is truth. Truth is the issue now. You've got to believe this, and the truth prevails in the end, Frank. You have to believe that and I'm sincere when I'm saying it to you. You've got to be truthful with yourself.

Miller then began digressing, talking about how he was "framed" by a detective in connection with his prior conviction and put in prison, and how "this is going to kill my father." Boyce continued to redirect Miller toward the murder, and finally the confession came out. The entire interrogation lasted about fifty-eight minutes. There were no threats or explicit promises made, and no physical coercion. Miller, who was coherent throughout the questioninng, passed out at the end.

The state trial court refused to suppress the confession,[3] and Miller was convicted after a four-day trial.[4] A three-judge panel of the Appellate Division of the New Jersey Superior Court reversed unanimously, stating "we deplore the techniques and tactics which extracted this confession and which, in our judgment, denied defendant due process of law." The court's opinion, which is principally composed of quotes from the interrogation transcript, characterizes Boyce's method of interrogation as "psychological pressure," and in a short conclusion invoked the "the fair winds of due process" which "blow on the guilty as well as the innocent." [5]

The New Jersey Supreme Court, in a 4-3 decision, reversed the Appellate Division and reinstated the convic-

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[3] In declining to suppress the confession, the trial court relied on the absence of an inducement.

[4] Miller was sentenced to life imprisonment.

[5] The quotes in this paragraph are taken from the unpublished opinion of the appellate division, State v. Miller, No. A-1275-73 (N.J. App. October 27, 1975).

tion. *State v. Miller*, 76 N.J. 392, 388 A.2d 218 (1978). The court stated the appropriate legal standard:

> Every case must turn on its particular facts. In determining the issue of voluntariness, and whether a suspect's will has been overborne, a court should assess the totality of all the surrounding circumstances. It should consider the characteristics of the suspect and the details of the interrogation. Some of the relevant factors include the suspect's age, education and intelligence, advice as to constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature and whether physical punishment or mental exhaustion was involved. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854, 862 (1973). A suspect's previous encounters with the law has been mentioned as an additional relevant factor. *State v. Puchalski*, 45 N.J. 97, 101, 211 A.2d 370 (1965).

76 N.J. at 402, 388 A.2d at 223. The court then proceeded to make subsidiary findings on the relevant factors, and applying the "totality of the circumstances" standard, held that the use of the "friendly cop" approach by Boyce did not overbear Miller's will. The court relied primarily on the following facts: the interrogation was not excessively long. Boyce at no time misled Miller into thinking he was anything but an interrogating police officer, and Miller understood the significance and probable outcome of confessing to the killing of Deborah Margolin. *Id.* at 403-04, 388 A.2d at 224. The court held that "the interrogation in this case did not exceed the proper bounds and that the voluntariness of defendant's confession could properly have been determined by the trial court to be established beyond a reasonable doubt." *Id.*

Miller petitioned for a writ of habeas corpus in the United States District Court for the District of New

Jersey. The petition was referred to a magistrate, who recommended that the writ be denied. The district court agreed, rejecting Miller's contention that the psychological pressure created by the questioning made the confession involuntary in the constitutional sense. The district court held that, based on its independent review of the evidence, including the tape of the confession, Miller's will was not "overborne" by Boyce's questioning. The court adopted the magistrate's recommendation denying the writ of habeas corpus and granting a certificate of probable cause.[6] This appeal followed.

II. *SCOPE OF REVIEW*

Under 28 U.S.C. § 2254(d), a state court factual finding is entitled to a "presumption of correctness" in a federal habeas corpus proceeding unless one of eight enumerated exceptions apply.[7] The first seven exceptions,

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[6] A certificate of probable cause is required to appeal from a decision of the district court denying a writ of habeas corpus. 28 U.S.C. § 2253.

[7] Subsection (d) reads as follows:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;

[Continued]

which go to the procedural adequacy of the state proceedings, are not applicable to this case. The eighth exception, which we address below, applies where a factual conclusion is not adequately supported by the record as a whole.

The controlling case on the application of the eighth exception in this context is *Patterson v. Cuyler*, 729 F.2d 925 (3d Cir. 1984). *Patterson*'s principal holding is that a decision of a state court concernnig the voluntariness of a waiver of *Miranda* rights is entitled to the "pre-

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[7] [Continued]

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record;

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7) inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraphs numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

sumption of correctness." Writing for the court, Judge Sloviter analyzed four recent Supreme Court decisions emphasizing the great deference due to state court factual findings in habeas corpus proceedings. *See Rushen v. Spain*, —— U.S. ——, 104 S. Ct. 453 (1983) (biased nature of jury deliberations is a finding of fact; presumption of correctness applies); *Maggio v. Fulford*, —— U.S. ——, 103 S. Ct. 2261 (1983) (presumption applies to competence to stand trial); *Marshall v. Lonberger*, 459 U.S. 422 (1983) (presumption applies to voluntariness of a guilty plea); *Sumner v. Mata*, 455 U.S. 591 (1982) (presumption applies to state of mind of witness in pre-trial photographic identification). On the basis of these cases, Judge Sloviter concluded that, contrary to our prior holdings,[8] "mixed questions of law and fact" such as whether a confession is voluntary or not are subject to the presumption of correctness contained in 28 U.S.C. § 2254(d).

Neither *Patterson* nor the recent Supreme Court decisions hold that we have lost our plenary power to review questions of federal law. Instead, the Court has mandated that we treat state-court factual findings dealing with a defendant's state of mind as such, and apply the presumption of correctness, even where that finding may be dispositive as a matter of law of the defendant's claim. Section 2254(d), of course, contains exceptions, the most important of which is that the presumption does not apply unless the factual findings are fairly supported by the record. *See* 28 U.S.C. § 2254(d). Thus, as we read *Patterson* and the recent Supreme Court cases which it interprets, our review is limited to determining whether the state court applied the proper legal test, and whether the factual conclusions reached by the state court are sup-

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[8] *See* United States *ex. rel.* Haywood v. Johnson, 508 F.2d 322 (3d Cir.), *cert. denied*, 422 U.S. 1011 (1975); United States *ex. rel.* Rush v. Ziegele, 474 F.2d 1356, 1358-59 (3d Cir. 1973).

ported on the record as a whole;[9] to the extent that our prior holdings gave us plenary review over state court findings as to state of mind, they are no longer valid.

The dissent complains bitterly that our opinion, which is, of course, informed by *Patterson*, reads recent decisions of the Supreme Court as effectively overruling, *sub silento*, fifty years of caselaw of that Court holding that the question whether a defendant's state of mind renders his confession involuntary is a question of law, over which we have plenary review in a habeas corpus case. The dissent may be correct on this point. *Patterson* is binding precedent, however, and we must apply it unless we find it distinguishable, which we do not.[10] We note, that *Patterson*'s reading of the trend of the recent Supreme Court decisions has since been reinforced by the Court in *Patton v. Yount*, —— U.S. ——, 52 U.S.L.W. 4896, 4899 n. 12 (1984).[11] At all events, we

[9] As noted above, the first seven exceptions of § 2254(d), which go to the procedural adequacy of the state proceedings, are not at issue in this case.

[10] The dissent points to several "distinctions" between the voluntariness of *Miranda* waivers, the subject matter of *Patterson*, and the voluntariness of confessions, but they are distinctions without a significant difference. Although a *Miranda* waiver itself is not exculpatory, any subsequent confession is likely to be, as is evidence by this case, and the problem of ascertaining the defendant's state of mind are likely to be identical whether the "voluntariness" challenge is to the *Miranda* waiver or to the confession itself. It is doubless for this reason that the *Patterson* panel encompassed confessions within its holding.

To the extent that the dissent is arguing that *Patterson* was incorrectly decided, it is arguing an issue that is not before us, but that may only be decided by this Court *in banc* or by the Supreme Court. *See* Third Circuit Internal Operating Procedures Ch. VIII(c).

[11] The dissent argues that *Patton* supports its position, relying on the fact that the Court in *Patton* listed a number of factors which favor deference to the trial court on the issue involved in that case: juror bias. The question before us, however, is not the wisdom of section 2254(d); it is, instead, whether the question of

believe that *Patterson* was correctly decided and that its principles are applicable to voluntary confession cases.[12]

The concept of voluntariness is not one that lends itself to easy description. In determining whether a confession is voluntary, a court must make three determinations. First, the court must find the subsidiary facts on which the ultimate conclusion must be based—the circumstances surrounding the defendant's confession. Second, the court must draw an inference as to the effect that those surrounding circumstances had on the defendant's mental processes. Third, the court must determine whether the mental processes which led the defendant to confess were such that the confession was "voluntary" within the constitutional standard. *See Culombe v. Connecticut*, 367 U.S. 568, 603 (1961). The dissent does not dispute that, in reviewing a finding of voluntariness, we must defer as to the state court's findings of the subsidiary facts, such as the circumstances of the questioning and the defendant's mental capacities, as long as they are supported by the evidence. There is also no dispute that we are free to review, on a plenary basis, the legal standard applied to the "state of mind" inference drawn by the state court. The disputed question in this case is whether the inference as to the defendant's state of mind should be treated as a separate factual conclusion, to which we must also defer, or whther it is so

a defendant's state of mind at the time of his confession is a question of fact, or a mixed question of law and fact. In *Patton*, which also required the application of a legal standard to an individual's state of mind, the Court held that the question of the juror's "state of mind" was a question of fact, on which the state court was entitled to deference. A similar inquiry is present in a voluntary confession case, and section 2254(d) is similarly applicable to the inference drawn by the state court concerning the defendant's state of mind.

[12] The extended discussion that follows is respective to the dissent. *Patterson* was a unanimous decision and there was no occasion for such comment.

inextricably bound up with the legal standard that the two steps are really one, over which we have plenary review.[13]

In the long series of cases cited by the dissent, the Supreme Court confronted confessions made under varying circumstances. These cases generally presented undisputed facts, including unrecorded interrogation of the defendant by police officers, long periods of questioning during which the defendant was denied sleep, access to counsel, or any other form of outside support, and often included disputes over whether physical force was used. The court was consistently dubious that a confession given under these circumstances could be considered "voluntary"; yet state judges and juries were finding, on the basis of these facts, that confessions were voluntary. A precise legal definition of voluntariness, however, remained elusive. As a result, the Court engaged in an independent, case-by-case review of the state courts' conclusions concerning voluntariness, on the basis of the subsidiary facts as found by the state court, and substituted its conclusion for that of the state courts.

The case which perhaps best highlights the Court's approach to this problem is one stressed by the dissent: *Culombe v. Connecticut*, 367 U.S. 568 (1961). In *Culombe*, the Court utilized the same three-stage analysis as we do here, but did not treat state court findings concerning the defendant's state of mind as binding. The court did not, however, base its holding on an unconstrained review of the state-of-mind finding. This is clear from a passage from Justice Frankfurter's opinion in *Culombe*

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[13] The question of the degree of deference to be given by a federal court to state-court determinations of subsidiary facts in a *habeas* case is not at issue in this case. The issue, rather, is what is a "fact" for purposes of review. The distinction raised by the dissent between direct-appeal cases and *habeas corpus* cases is therefore irrelevant to this case, since the issue of which determinations are "legal" and which are "factual" is the same in both contexts.

which immediately follows the segments quoted by the dissent:

> Great weight, of course, is to be accorded to the inferences which are drawn by the state courts. In a dubious case, it is appropriate with due regard to federal-state relations, that the state court's determination should control. But where on the uncontested external happenings, coercive forces set in motion by state law enforcement officials are unmistakably in action; where these forces, under all the prevailing states of stress, are powerful enough to draw forth a confession; where, in fact, the confession does come forth and is claimed by the defendant to have been extorted from him; and where he has acted as a man would act who is subjected to such an extracting process—where this is all that appears in the record—a State's judgment that the confession was voluntary cannot stand.

367 U.S. at 605. Fairly speaking, the "inference" concerning the defendant's state of mind, therefore, was never considered a purely "legal" question; rather, it was viewed as a hybrid question, on which the state court's conclusion was entitled to some deference.[14]

In recent years, the Supreme Court has shown considerable concern for segregating "factual" and "legal" issues for purposes of appellate review. *See Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982) ("ultimate" findings of fact, which are dispositive of the legal issues involved, are entitled to deference under the

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[14] As pointed out in footnote 6 of the dissent, statements in some of the Supreme Court confession cases that the Court would not be bound by factual findings dispositive of the federal issues are "overstatements." If any of the earlier cases were dependent on such reconsiderations of factual conclusions, those cases have been overruled. *See* 28 U.S.C. § 2254(d); Townsend v. Sain, 372 U.S. 293 (1963). *Cf.* Pullman-Standard v. Swint, 456 U.S. 273, 287-88 (1982).

"clearly erroneous" standard of Fed. R. Civ. P. 52(a)).[15] The cases relied on by this court in *Patterson* extend that concern to habeas corpus review of state court criminal convictions. *See also Patton v. Yount*, —— U.S. ——, 52 U.S.L.W. 4896 (1984). *Patterson* found this trend generally applicable to constitutional questions that turn on a determination about a defendant's state of mind, and held that such determinations were ultimate questions of fact, rather than questions of law. We read the recent decisions of the Supreme Court, as interpreted by *Patterson*, as holding that the second stage of the *Culombe* inquiry—that concerning the inference as to the defendant's state of mind—should no longer be considered a "legal" or "hybrid" question as it was in *Culombe*, but rather a question of "ultimate fact" in the sense of *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

This increased concern with limiting the scope of review reflects a change of emphasis on the part of the Supreme Court. Before the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court had used the "voluntariness" inquiry as a way to check outrageous interrogation practices by law enforcement agencies. Since *Miranda*, however, voluntariness inquiries have played a far less important role in court supervision of police practices. Before *Miranda*, the courts were frequently presented with confessions extracted by means of the "third degree." Since *Miranda*, however, voluntary confession cases turn more often on factors such as the individual defendant's intelligence and understanding of

[15] The Court has made at least one exception, on policy grounds, to the limitation on appellate review inherent in the *Pullman-Standard* rule. *See* Bose Corp. v. Consumers Union, —— U.S. ——, 104 S.Ct. 1949 (1984). Judge Gibbons believes that a similar exception to § 2254(d) is implicit in the Supreme Court's treatment of the voluntary confession cases. *See* typescript at 17. We disagree. We believe that the "policies" cited by the dissent can be dealt with within the framework of the ordinary scope of review.

the proceedings. In these latter cases, state court determination of state of mind will frequently be dispositive, if given deference by the federal courts in habeas corpus proceedings. The Supreme Court clearly understood this in its recent decisions. These cases, therefore, appear to involve a policy decision by the Court to limit the scope of federal supervision of the interrogation process, as long as the police have complied with the prophylactic rules of *Miranda*.[16]

Notwithstanding the dissent's hyperbole, the case before us today does not present the type of gross abuses of fundamental fairness that characterized many of the voluntariness cases which came before the Court in the years before its decision in *Miranda*; instead, it is typical of voluntary confession cases in the post-*Miranda* era. There was no secret interrogation in this case; indeed, the entire encounter was tape-recorded. The questioning was not pressed for a long period of time, and Miller was aware of his right to terminate it upon request. He was not denied food or other necessities, nor was he physically abused or threatened. We cannot say, and we doubt that the dissent would assert, that no confession made under

[16] In addition, the Court's decision in *Miranda* also served to increase the awareness of constitutional rights on the part of local police officers and state court judges, thereby reducing the number of outrageous cases and the need for federal review.

The dissent misrepresents our position when it says that we hold that *Miranda* compliance affects the scope of review in a habeas case over a state-court determination about a defendant's state of mind. Our *Miranda* reference should rather be understood as an effort to explain the shift in the law. We add to this historical comment the assertion that, at the same time as *Miranda* was taking care of the worst abuses of police authority, the Court was becoming increasingly concerned with the explosion in the workload of the federal courts, particularly the appellate courts, and with the proper allocation of functions between the state and federal courts. *E.g.*, Parratt v. Taylor, 451 U.S. 527 (1981). Given these developments, the Court has sought to limit the federal role to defining constitutional standards, and dictated that we defer to state courts in applying those standards where these applications are reasonable.

the circumstances presented in this case could ever be "voluntary." Instead, we are asked to judge the effect of a particular set of circumstances on a particular defendant. This type of inquiry is one which seems to us to be peculiarly within the proper realm of the trier of fact.

We recognize that, in circumstances where the ultimate question of fact is one involving state of mind, it may be difficult to pinpoint the "factual" conclusion as to state of mind, and to state the "legal standard" in such a way as to make its application mechanistic. Under such circumstances, federal courts in habeas corpus cases must either review underlying conclusions about the defendant's state of mind as legal questions, or allow the fact-finding courts some leeway in applying legal standards to the facts of specific cases. Our reading of the recent Supreme Court decisions relied on in *Patterson* is that the Court has chosen to require strict adherence to the limited scope of review over facts, even where it would result in giving state trial courts some leeway in applying the constitutional standard.

Our decision does not leave the federal courts devoid of power to redress state court decisions which violate fundamental constitutional rights. The legal standard to be applied is a federal question. State courts must apply the federal constitution as it is interpreted by the federal courts, and they may not draw inferences as to a defendant's state of mind that are not supported by objective facts. But where, as here, the objective facts support a factual inference that the defendant's "state of mind" was such that the confession was voluntary within the meaning of the Constitution, it is not the role of the federal courts to second-guess the inference drawn by the state courts.

III. *THE VOLUNTARINESS OF THE CONFESSION*

The constitutional test for voluntariness involves a determination, on the totality of the circumstances, whether the confession was a product of the defendant's

free will, or whether it was the product of interrogation which resulted in the overbearing of the defendant's will. *Schneckloth v. Bustamont*, 412 U.S. 218 (1973). In most instances, the controlling question is the defendant's state of mind—a question of fact. In this case, the New Jersey Supreme Court [17] stated a number of subsidiary factual conclusions: that Miller was a man of reasonable intelligence who had experience with and understood the workings of the criminal justice system; that Miller's distress during the interview was a product of his realization of what he had done, not of coercive pressure by Boyce; that Miller was not deceived into believing that Boyce was anything other than a police officer investigating a serious crime for which Miller was the prime suspect; and, that Miller was well aware that, if he confessed, he would be handled through the criminal justice system. The court then concluded, on the basis of these findings, that Miller's confession was the product of his free will, rather than psychological coercion. 76 N.J. at 404, 388 A.2d at 224. Under § 2254(d), these conclusions are presumed to be correct, and we must accept them as long as they are fairly supported by the record as a whole. We find that they are.

The most relevant part of the record in this case is the tape of Miller's interrogation and confession, and we must therefore analyze the confession tape to determine whether it supports the conclusion of the New Jersey Supreme Court. No objection is made to Boyce's confronting Miller with discrepancies in his explanation of where he was at the time of the murder, or with the statements of the victim's brothers describing the car that approached their home that morning and its driver.

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[17] The fact that the facts found in this case are taken from the opinion of the New Jersey Supreme Court, rather than from a statement of findings by the trial court, does not vitiate the presumption of correctness. *See* Time, Inc. v. Firestone, 424 U.S. 448, 461 (1976); Hance v. Zant, 696 F.2d 940, 946 (11th Cir.), *cert. denied*, —— U.S. ——, 103 S. Ct. 3544 (1983); United States *ex rel.* Heral v. Franzen, 667 F.2d 633 (7th Cir. 1981).

During the questioning, Boyce did lie in telling Miller that the victim had died only a few minutes beforehand, but this lie does not render the confession legally involuntary unless it undermined the "voluntariness" of the confession under the totality of the circumstances. *See Frazier v. Cupp*, 394 U.S. 731, 739 (1969). Since the colloquy about the time of the victim's death did not seem to affect Miller at all, it cannot be said to have undermined the voluntariness of the confession. Obviously, the fact that the interrogation was "sympathetic" rather than confrontational does not render it coercive. Similarly, to the extent that Boyce confronted Miller with the enormity of his crime, attempting to appeal to his conscience, the questioning is not objectionable, even though Boyce referred to the incident as a "problem" rather than a crime.

Miller's principal contention is that Boyce's repeated assertions that Miller did not have "a criminal mind," and that he needed help, rather than punishment, amounted to deception or psychological coercion which undermined the voluntariness of the confession. It is axiomatic that coercion need not be physical to render the confession involuntary; any coercion which denies the defendant the freedom to remain silent may be enough. *See Garrity v. New Jersey*, 385 U.S. 493, 496 (1967). Psychological coercion is enough if, under the totality of the circumstances, it results in the overbearing of the defendant's will. All police practices that encourage defendants to confess, however, do not amount to psychological coercion. Our role is to review the nature of the questioning involved, accepting as true those findings of the state court that involve the defendant's state of mind, to determine whether the tactics used by Detective Boyce in this case were unconstitutionally coercive.

The most substantial potential problem with the confession is that Boyce's questioning arguably implied that Miller would receive "help," not punishment, if he confessed.[18] The use of promises by an interrogating officer can be sufficient to invalidate a confession. *See Robinson v. Smith*, 451 F. Supp. 1278, 1290 (W.D.N.Y. 1978), and cases cited therein. In general, however, promises by interrogators will not invalidate a confession unless they are sufficient to "overbear the defendant's will"—the general standard of voluntariness. *See Fernandez-Delgado v. United States*, 368 F.2d 34 (9th Cir. 1966) (where defendant was told that any assistance to investigators would be brought to the attention of prosecutors, confession was not rendered inadmissible as a result); *United States v. Ferrara*, 377 F.2d 16 (2d Cir.), *cert. denied*, 389 U.S. 908 (1967) (where interrogator told defendant that if he cooperated with the government, he would be released on a reduced bail, the confession was not rendered involuntary); *United States v. Glasgow*, 451 F.2d 557 (9th Cir. 1971) (per curaim) (where interrogator told defendant he would inform prosecutor if defendant cooperated, the confession was not necessarily rendered involuntary).[19]

In this case, Miller showed a continuing recognition of the depth of the trouble that he was in and the consequences of telling Boyce the truth. Although Boyce stated that he felt Miller needed help, not imprisonment, this was only part of his approach. He also spoke to Miller about the need to tell the truth to purge his con-

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[18] Boyce never explicitly promised to do anything other than "do all I can with the psychiatrist and everything . . ." In context, this statement apparently refers to a discussion, moments earlier, of the lack of proper psychiatric treatment under Miller's parole for a prior crime.

[19] Appellant relies on the venerable case of Bram v. United States, 168 U.S. 532, 542-43 (1897), in which the court stated that a confession is involuntary if "obtained by any direct or implied promise, however slight." As the Second Circuit has stated, "[t]hat language has never been applied with the wooden literalness urged upon us by appellant." United States v. Ferrara, 377 F.2d 16, 17 (2d Cir. 1967).

science,[20] and continually intermixed his statements about Miller's "problem" with his appeals to conscience. The state court found that this questioning did not overbear Miller's will, and thus did not render the confession involuntary. As we have noted above, we conclude that the state court's determination as to the effect on Miller's state of mind was supported on the record as a whole.

IV. *CONCLUSION*

Under the caselaw on the question of voluntariness, the inquiry before us is whether the confession was "a product of an essentially free and unconstrained choice by its maker." Judging by this standard, in light of our restricted scope of review, we have concluded that Miller's confession was voluntary and hence admissible.[21] The judgment of the district court will be affirmed.

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[20] For instance, at page 12 of the typescript, Boyce said:

> B: Frank, listen to me, honest to God, I'm, I'm telling you, Frank, (inaudible). I know, it's going to bother you, Frank, it's going to bother you. It's there, it's not going to go away. It's there. It's right in front of you, Frank. Am I right or wrong?
>
> M: Yeah.

[21] Even if our review on this question was plenary, we would reach the same result. We essentially agree with the conclusions of the New Jersey Supreme Court concerning the effect of Boyce's questioning of Miller. *See supra* typescript at 9-10. We also agree that Boyce's questioning technique could, under different circumstances, create risks of deception. The same questioning coming from, for example, a psychiatrist employed by the police but not clearly identified as a detective, might well create a situation in which the confession would not be voluntary. *See* Leyra v. Denno, 347 U.S. 556 (1954) (confession made to a psychiatrist, following three days of prior questioning by police, where psychiatrist was not identified as a police interrogator, was not voluntary). Similarly, if Boyce's questioning had in fact induced Miller to confess in the belief that he would receive psychological "help" rather than punishment, the confession would not be "voluntary."

GIBBONS, *Circuit Judge*, dissenting.

This is a tragic case, made so by the grim death of a young woman, by the abrasive, debilitating psychological ploys used to extract a confession of her murder, and by this court's refusal to follow more than fifty Supreme Court precedents holding that the question whether a confession is involuntarily given is a mixed question of law and fact, over which our review of the ultimate question of voluntariness is for error of law. The majority's holding places us in conflict with eight Federal Circuits. Our decision is all the more disconcerting because, as a matter of law, the confession of the defendant, Frank Miller, was involuntarily obtained. By classifying the issue as one of "fact" and deferring to the "factual" findings of the state courts—findings those courts neither made nor purported to make—the majority has abdicated its judicial responsibility to make an independent determination of the voluntariness of a confession. And as a crowning irony to this court's decision, a majority of the eleven New Jersey judges who reviewed this confession, and to whom we are deferring, concluded not that it was voluntary but that it was involuntary; and all eleven judges asserted that they were drawing a legal conclusion. I emphatically dissent.

I.

The confession at issue here was the product of implied promises, trickery, cajolery, dissembling, and exaggeration. Because a complete transcript and tape recording of the interrogation are in the record, none of the historical facts concerning Miller's confession are in dispute. The majority's abridged account of Detective Boyce's questioning conveys neither the deceipt employed by nor the intensity of the interrogation.

Early in the interrogation Detective Boyce led Miller to believe that Miller had been identified at the scene of the crime. "[W]e have a physical description," Boyce

asserted, that "fits you and the clothes you were wearing." App. at 7. Later Boyce told Miller, "[Y]ou were identified as being there talking to her minutes before she was . . . [murdered]." App. at 9. In fact Boyce had no such identification. The witness, Daniel Margolin, testified:

> I didn't pay very much attention to the person [driving the car] because I assumed it was someone in the neighborhood and all I really noticed about the individual was he looked about average, he looked like a factory worker and that he had loose-fitting clothing on.

Tr. at 169-70. No identification of Miller was ever introduced at trial. Nevertheless, unaware of Boyce's misrepresentation during the interrogation, Miller responded "[L]ike you say, I'm identified and my car's identified." App. at 8.

Boyce also represented that blood stains of Deborah Margolin, the victim, were found on Miller's doorstep. "We went to your house last night and found blood stains on the front stoop," Boyce dissembled. App. at 6. In fact the state introduced no such evidence at trial and does not contend on appeal that any such blood existed.

Nor did the interrogation stop with these fabrications. Miller had been detained in the Flemington State Police Barracks kitchen for two hours before his interrogation. In pretrial proceedings Miller testified that during this detention, Officer Scott "told me that a girl had been cut but that she was lucky she was still alive and was going to be able to identify the guy that done it." Tr. at 109. Scott's assertion was false; although both officers knew that Margolin had died five hours earlier, they deliberately left the impression that she had given a description and could identify her assailant. Alluding to Scott's remark that Margolin "was in the hospital," App. at 9, Miller asked his interrogator whether Margolin was still alive. App. at 8. Boyce quickly ad-libbed, "She died just

a few minutes ago. I just got . . . that's what that [telephone] call was about.[1] App. at 9. In fact Margolin had died hours earlier leaving no description of her assailant.

These prevarications were followed by thirty-eight minutes of intensive, relentless questioning during which Boyce plainly and simply overbore the defendant's will. Boyce badgered Miller incessantly with promises of help if Miller would confess. On no less than 41 occasions Boyce urged that Miller admit he had a problem, that he needed help to solve his problem, and that Boyce would provide that help if Miller would confess. App. at 6-17 *passim*. "If I promise to, you know, do all I can with the psychiatrist and everything, and we get the proper help for you, . . . will you talk to me about it?" whispered Boyce. App. at 12. "[W]e're going to see to it that you get the proper help. This is our job, Frank. This is our job. This is what I want to do," Boyce intoned. App. at 15. On at least 12 other occasions Boyce urged that Miller would not be held responsible for his actions. "[I]t's not your fault, it's their fault," said Boyce. App. at 11. "[I]f you did commit an act, actually the're the ones that are to blame, in my eyes . . . not you as an individual." *Id.* "[I]t may have been an accident," Boyce entreated. "It may be something that, that you did that you can't be held accountable for." App. at 15. The tape reveals Miller sobbing thirty minutes into the interrogation, distraught, weak, and unstable.

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[1] The tape recording of the interrogation reveals that a telephone rang shortly before Miller asked whether Margolin had died. Boyce quickly fabricated a story that the caller informed him that Margolin had died moments earlier.

In pretrial testimony Scott asserted that he did not "discuss any aspect of the murder of Miss Deborah Margolin" in the Barracks kitchen. Tr. at 58. In light of Miller's contemporary allusion on the tape to Scott's remark that Margolin "was in the hospital," this testimony was not credible. The trial court found only that Miller "was not interrogated" during this period. Tr. at 145, a finding not inconsistent with the fact that Scott remarked to Miller that Margolin was in the hospital when the interrogation began. *See* Rhode Island v. Innis, 446 U.S. 291, 299-303 (1980).

As if there could be any doubt about the intensity of this debilitating examination, at the conclusion of Boyce's interrogation Miller lapsed into unconsciousness. The majority glosses over the fact that Miller passed out on the floor at the end of the questioning as though this were the ordinary response of one in control of his will during an interrogation. In fact Miller's unconscious state prevented the officers from obtaining any signed confession. Detective Boyce testified:

> Q. I gather that [a] statement was never taken, is that right?
>
> A. It was not.
>
> Q. Why was that, Officer?
>
> A. Momentarily after terminating this particular interview Mr. Miller went into as I can best define it a state of shock.
>
> Q. What do you mean by that, sir?
>
> A. He was sitting on a chair—. . .
>
> Mr. Miller had been sitting on a chair, had slid off of the chair on to the floor maintaining a blank stare on his face, staring straight ahead and we were unable to get any type of verbal response from him at that time.
>
> Q. As I understand it he was then removed to the Hunterton Medical Center, is that right?
>
> A. Yes, the first aid squad was contacted immediately.

Tr. at 84-85.

In a unanimous, strongly worded opinion, the New Jersey Appellate Division condemned these adjurations as "relentless and successful Svengalian efforts." *State v. Miller*, 76 N.J. 392, 419, 388 A.2d 218, 232 (1978) (Conford, P.J.A.D., dissenting).[2] Without dissent the court held that Miller "could not long resist the tremendous psychological pressure." *Id.* "The tape transcript must be read in its entirety for its full aroma to be savored," that court observed. *Id.* at 413, 388 A.2d at 229. Miller's ultimate confession, the court held, was a "capitulation to the superior mind." *Id.* at 422, 388 A.2d at 234. And capitulation it was. Miller was tricked by an intensive, hypnotic 58-minute interrogation into incriminating himself by a superior questioner who played on Miller's unstable, childlike mind.

[2] The opinion of the Appellate Division is reproduced in substantial part in Judge Conford's dissent, to which the citations in this opinion refer.

II.

After reviewing these events, the New Jersey Appellate Division held:

> An overbearing broadside which results in a confession by virtue of intense and mind bending psychological compulsion deserves no better fate at our hands than does the legendary rubber hose. *Chambers v. Florida*, 309 U.S. 227 (1940). We have long cherished a determination that the fair winds of due process shall blow upon the guilty as well as the innocent. We will not here let our gratitude for good police work which ferreted out one who is most probably a murderer, and our abhorrence at the crime he committed, cause us to abandon basic constitutional principles.

76 N.J. at 422-23, 388 A.2d at 234. Without applying these constitutional principles, indeed without referring to them, the majority today characterizes the voluntariness of Miller's confession as a question of "fact." The "factual" finding of the New Jersey Supreme Court, the majority concludes—a finding that court never made, for the New Jersey Supreme Court held that it was deciding a question of law—is not without support in the record. Consequently, the majority reasons, we must defer to the state courts' "finding" that Miller's confession was voluntary.

This disposition is squarely in conflict with Supreme Court precedent. Over fifty Supreme Court decisions have held that the voluntariness of a confession is a

mixed question of law and fact over which our review of the ultimate question of voluntariness is plenary.[3]

[3] The Supreme Court has reversed convictions predicated on confessions held involuntary as a matter of law on 31 occasions. Brown v. Mississippi, 297 U.S. 278 (1936); Chambers v. Florida, 309 U.S. 227 (1940); Canty v. Alabama, 309 U.S. 629 (1940) (per curiam) (summary reversal on authority of *Chambers*); White v. Texas, 310 U.S. 530 (1940) (on petition for rehearing after summary reversal); Lomax v. Texas, 313 U.S. 544 (1941) (per curiam) (summary reversal on authority of *Chambers* and *White*); Vernon v. Alabama, 313 U.S. 547 (1941) (per curiam) (same); Ward v. Texas, 316 U.S. 547 (1942); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Malinski v. New York, 324 U.S. 401 (1945); Haley v. Ohio, 332 U.S. 596 (1948); Watts v. Indiana, 338 U.S. 49 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Harris v. South Carolina, 338 U.S. 68 (1949); Johnson v. Pennsylvania, 340 U.S. 881 (1950) (per curiam) (summary reversal on authority of *Turner*); Leyra v. Denno, 347 U.S. 556 (1954); Fikes v. Alabama, 352 U.S. 191 (1957); Payne v. Arkansas, 356 U.S. 560 (1958); Spano v. New York, 360 U.S. 315 (1959); Blackburn v. Alabama, 361 U.S. 199 (1960); Reck v. Pate, 367 U.S. 433 (1961); Culombe v. Connecticut, 367 U.S. 568 (1961); Gallegos v. Colorado, 370 U.S. 49 (1962); Lynumn v. Illinois, 372 U.S. 528 (1963); Haynes v. Washington, 373 U.S. 503 (1963); Davis v. North Carolina, 384 U.S. 737 (1966); Garrity v. New Jersey, 385 U.S. 493 (1967); Clewis v. Texas, 386 U.S. 707 (1967); Beecher v. Alabama, 389 U.S. 35 (1967) (per curiam); Greenwald v. Wisconsin, 390 U.S. 519 (1968) (per curiam); Darwin v. Connecticut, 391 U.S. 346 (1968) (per curiam); Mincey v. Arizona, 437 U.S. 385 (1978).

The Court has sustained convictions predicated on confessions held voluntary as a matter of law on 14 occasions. Lisenba v. California, 314 U.S. 219 (1941); Lyons v. Oklahoma, 322 U.S. 596 (1944); Gallegos v. Nebraska, 342 U.S. 55 (1951); Stroble v. California, 343 U.S. 181 (1952); Brown v. Allen, 344 U.S. 443 (1953); Stein v. New York, 346 U.S. 156 (1953); Thomas v. Arizona, 356 U.S. 390 (1958); Ashdown v. Utah, 357 U.S. 426 (1958); Crooker v. California, 357 U.S. 433 (1958); Cicenia v. Lagay, 357 U.S. 504 (1958); Boulden v. Holman, 394 U.S. 478 (1969); Frazier v. Cupp, 394 U.S. 731 (1969); Procunier v. Atchley, 400 U.S. 446 (1971); Hutto v. Rosa, 429 U.S. 28 (1976) (per curiam).

In addition, the Supreme Court has addressed several procedural issues pertaining to the determination of voluntariness. In these instances the Court reaffirmed that the ultimate issue of voluntariness of a confession is one of law and remanded for further proceedings. *See* Lee v. Mississippi, 332 U.S. 742, 743-46 (1948) (defendant's denial that confession was made does not estop assertion that it was involuntary); Rogers v. Richmond, 365 U.S. 534, 540-49 (1961) (impermissible to rely on reliability of confession as evidence of voluntariness); Townsend v. Sain, 372 U.S. 293, 307-09 (1963) (circumstances under which evidentiary hearing must be held in habeas corpus proceedings); Jackson v. Denno, 378 U.S. 368, 376-91 (1964) (trial court must make initial determination of voluntariness before submission to jury); Boles v. Stevenson, 379 U.S. 43, 44-46 (1964) (per curiam) (same as *Jackson*); Sims v. Georgia, 385 U.S. 538, 541-44 (1967) (same; trial court's conclusion of voluntariness "must appear from the record with unmistakable clarity"); Lego v. Twomey, 404 U.S. 477, 482-89 (1972) (voluntariness in *Jackson v. Denno* hearing need be established only by preponderance of evidence).

Indeed, no issue has consumed the attention of the Supreme Court more completely in this century, no single question has been investigated more thoroughly nor dissected more vigorously, than the standards for the voluntariness of a confession. The most recent of these decisions, decided barely a month after the New Jersey Supreme Court's decision in this case, reiterated what has become rote in the Court's jurisprudence: a confession is voluntary only if it is "'"the product of a rational intellect and a free will,"'" and "[i]n making this determination, we are not bound by the [state] [s]upreme [c]ourt's holding that the statements were voluntary. Instead, this Court is under a duty to make an independent evaluation of the record." *Mincey v. Arizona*, 437 U.S. 385, 398 (1978).

The authority for the majority's decision to ignore 48 years of Supreme Court precedent holding that the ultimate issue of voluntariness of a confession is a question of law is the panel opinion of this court in *Patterson v. Cuyler*, 729 F.2d 925 (3d Cir. 1984). Creating a conflict with eight Federal Circuits, *see* note 20 *infra*, *Patterson* reasoned that the voluntariness of a confession is an issue of historical fact.[4] In so reasoning, the

[4] Language in *Patterson* might be read to hold that voluntariness of a confession is a mixed question of law and fact, and that such

Patterson court concluded that no less than fifty Supreme Court decisions have been overruled *sub silentio*, a *coup muet* said to be the work of three recent decisions of the Supreme Court.[46] None of the recent opinions examined in *Patterson* addresses the voluntariness of a confession. The *Patterson* court mentioned none of the fifty confession cases which it reasoned were overruled *sub silentio* or discussed the motive and purpose behind the Supreme Court's classification of voluntariness of a confession as a mixed question of law and fact. Indeed, *Patterson* itself addresses only the voluntariness of a *Miranda* waiver. No petition for rehearing in *Patterson* was filed.

I dissent from the majority's roughshod treatment of almost half a century of Supreme Court precedent. The history of the voluntary-confession doctrine makes it abundantly clear that the ultimate issue of voluntariness of a confession is a question of law. *See* Part III *infra*. Moreover, I dissent from the majority's deference to a finding of "fact" that no New Jersey Court has made. There is no authority for deference to a finding of "fact" when the court rendering such a "finding" was expressly held that it is not making a factual finding but drawing a legal conclusion. *See* Part IV *infra*. We pay little respect for the state courts by ignoring their holdings and rewriting their factual findings. Finally, I dissent from the majority's suggestion that three recent

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mixed questions are subject to the presumption of correctness of 28 U.S.C. § 2254(d) (1982). 729 F.2d at 932. This conclusion, however, is contradicted by the Supreme Court's recent decision in Strickland v. Washington, 104 S. Ct. 2052, 2070 (1984). Thus, I read *Patterson* to hold that the voluntariness of a confession is itself an issue of historical fact.

[46] Rushen v. Spain, 104 S. Ct. 453, 456 (1983) (per curiam) (jury bias a question of fact); Maggio v. Fulford, 103 S. Ct. 2261, 2262-64 (1983) (per curiam) (competence to stand trial a question of fact); Marshall v. Lonberger, 103 S. Ct. 843, 849 (1983) (ultimate question of voluntariness of guilty plea an issue of law). *Rushen* and *Maggio* were per curiam summary reversals decided without briefing or argument.

Supreme Court decisions have overruled *sub silentio* one of the most firmly grounded of Supreme Court doctrines. One of these decisions, holding that the ultimate issue of voluntariness of a guilty plea is a question of law, undermines the majority's position. Neither of the remaining decisions pertains to custodial interrogation conducted in closed proceedings. The import and force of the voluntary-confession doctrine, in contrast, is to afford independent federal review over these closed proceedings. *See* Part III D *infra*. The majority's decision today raises deeply disturbing questions concerning respect for *stare decisis* and regarding the appropriate role of the inferior federal courts in our hierarchical legal structure.

III.

Ultimate Issue of Voluntariness of a Confession is a Question of Law

A. *The Direct-Appeal Doctrine*

The Supreme Court held in 1936 that a conviction obtained by means of a confession extracted by violence violates due process of law. *Brown v. Mississippi*, 297 U.S. 278, 286 (1936). The interrogators in *Brown* brazenly admitted their torture. "This deputy was put on the stand by the state in rebuttal, and admitted the whippings,'" noted Chief Justice Hughes. Asked how severely one of the defendants was whipped, the deputy testified, "'" Not too much for a negro; not as much as I would have done if it were left to me."'" *Id.* at 284. Two others who had participated in the whippings "'were introduced and admitted it,'" the Court observed; "'not a single witness was introduced who denied it.'" *Id.* at 284-85. Thus no conflict in the trial testimony was presented in *Brown*. The Supreme Court held that on the basis of the facts admitted, "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these peti-

tioners, and the use of the confessions thus obtained as a basis for conviction and sentence was a clear denial of due process." *Id.* at 286.

On the Supreme Court's next occasion to address a coerced-confession claim, the interrogators were neither as brazen nor as foolish as those in *Brown*, for none admitted to mistreatment of the defendants. In *Chambers v. Florida*, 309 U.S. 227 (1940), the Florida Supreme Court had twice reversed the convictions of four defendants, directing that a jury decide in *coram nobis* proceedings whether their confessions were "'in fact freely and voluntarily made.'" *Id.* at 227-28 n.2. After a jury twice found the confessions voluntary, Florida's highest court affirmed. The evidence of voluntariness before the Supreme Court consisted of the transcripts of these *coram nobis* proceedings. "The testimony [in these proceedings] is in conflict," noted Justice Black, "as to whether all four petitioners were continually threatened and physically mistreated until they finally, in hopeless desperation and fear of their lives, agreed to confess . . . ." *Id.* at 231.

Before the Supreme Court the State of Florida urged that the jury's finding of voluntariness was a finding of "fact." This "finding," Florida argued, resolved any dispute in the testimony as to voluntariness and "finally determined [that issue] because passed upon by a jury." *Id.* at 228. The Supreme Court rejected this claim. "[W]e must determine independently," the Court held, "whether petitioners' confessions were so obtained, by review of the facts upon which that issue necessarily turns." *Id.* at 229 (footnote omitted). Because certain of the historical facts were disputed, the Court held, it would decide the voluntariness of the confessions as a matter of law on the basis of the undisputed historical facts. *Id.* at 238-39.

Chambers v. Florida thereby became the progenitor of the Supreme Court's direct-appeal doctrine in voluntary-confession cases. That doctrine provides that in reviewing

claims of coerced confession raised on direct appeal to the Supreme Court, the voluntariness of the confession is to be decided as a matter of law on the basis of the admitted or undisputed historical facts of record. The Court applied the direct-appeal doctrine without fail in seventeen voluntary confession cases decided after the *Chambers* decision in 1940 and before the first voluntary-confession claim to reach the Supreme Court by habeas corpus, *Brown v. Allen*, 344 U.S. 443 (1953), in 1953.[5] The Court's 1949 trilogy of confession cases, *Watts v. Indiana*, 338 U.S. 49 (1949); *Turner v. Pennsylvania*, 338 U.S. 62 (1949); *Harris v. South Carolina*, 338 U.S. 68 (1949), state the doctrine clearly:

> On review here of State convictions, all those matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this Court. Observance of this restriction in our review of State courts calls for the utmost scruple. But "issue of fact" is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions and their proper applications, are issues for this Court's ad-

[5] Canty v. Alabama, 309 U.S. 629 (1940) (per curiam); White v. Texas, 310 U.S. 530 (1940); Lomax v. Texas, 313 U.S. 544 (1941) (per curiam); Vernon v. Alabama, 313 U.S. 547 (1941) (per curiam); Lisenba v. California, 314 U.S. 219 (1941); Ward v. Texas, 316 U.S. 547 (1942); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Lyons v. Oklahoma, 322 U.S. 596 (1944); Malinski v. New York, 324 U.S. 401 (1945); Haley v. Ohio, 332 U.S. 596 (1948); Lee v. Mississippi, 332 U.S. 742 (1948); Watts v. Indiana, 338 U.S. 49 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Harris v. South Carolina, 338 U.S. 68 (1949); Johnson v. Pennsylvania, 340 U.S. 881 (1950) (per curiam); Gallegos v. Nebraska, 342 U.S. 55 (1951); Stroble v. California, 343 U.S. 181 (1952).

judication. . . . Especially in cases arising under the Due Process Clause is it important to distinguish between issues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review which this Court sits. . . .

[I]n all the cases that have come here during the last decade from the courts of the various States in which it was claimed that the admission of coerced confessions vitiated convictions for murder [citing fourteen cases], there has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication. Therefore only those elements of the events and circumstances in which a confession was involved that are unquestioned in the State's version of what happened are relevant to the constitutional issue here. *But if force has been applied, this Court does not leave to local determination whether or not the confession was voluntary.* There is torture of mind as well as body; the will is as much affected by fear as by force. And there comes a point where this Court should not be ignorant as judges of what we know as men.

Watts v. Indiana, 338 U.S. at 50-52 (opinion of Frankfurter, J.) (emphasis added) (footnote and citations omitted).

Indeed, the direct-appeal doctrine became so firmly rooted in Supreme Court jurisprudence that reiteration of the oft-repeated standard became second nature to the Court. Thus, after putting "to one side the controverted evidence" in *Haley v. Ohio*, 332 U.S. 596, 597-98 (1948), and noting that both the state trial court and the jury "found" the defendant's confession voluntarily made, *id.* 599, the Supreme Court held:

But the ruling of the trial court and the finding of the jury on the voluntary character of the confession do not foreclose the independent examination which it is our duty to make here. . . . If the undisputed evidence suggests that force or coercion was used to exact the confession, we will not permit the judgment of confiction to stand . . . .

Id. (opinion of Douglas, J.). Similarly, in *Gallegos v. Nebraska*, 342 U.S. 55 (1951), the Court held:

As this Court has been entrusted with power to interpret and apply our Constitution to the protection of the right of an accused to federal due process in state criminal trials, the proper performance of that duty requires us to examine, in cases before us, such undisputed facts as form the basis of a state court's denial of that right. . . . A contrary rule would deny to the Federal Government ultimate authority to redress a violation of constitutional rights. As state courts also are charged with applying constitutional standards of due process, in recognition of their superior opportunity to appraise conflicting testimony, we give deference to their conclusions on disputed and essential issues of what actually happened. . . . Its duty compels this Court, however, to decide for itself, on the facts that are undisputed, the constitutional validity of a judgment that denies claimed constitutional rights.

342 U.S. at 61 (opinion of Reed, J.).

The Supreme Court's decision to characterize the ultimate issue of voluntariness of a confession as one of law did not turn on an epistemological theory of whether "voluntariness" concerned the defendant's "state of mind" and whether such "state of mind" issues are questions of "fact." To the contrary, the Court's holdings had a far deeper motivation. The interrogations at issue took place in secret. They generally occurred in inherently coercive settings, frequently involving a single defendant shackled

or detained for long periods of time and surrounded or confronted by relays of five or more police officers. At trial the defendant's account was matched against the testimony of many officers, some of it obviously incredulous to the Supreme Court. The Court construed the ultimate question of voluntariness as one of law because the settings of police interrogations were secret and inherently coercive, because the Court had grave doubts about what transpired during these secret proceedings, and because federal review of these proceedings would be frustrated on direct appeal if the question were one of fact. Hence the Court's explanation in both *Haynes v. Washington*, 373 U.S. 503, 515-16 (1963), and *Stein v. New York*, 346 U.S. 156, 181 (1953)—both coerced-confession cases—that "this Court cannot allow itself to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding." [6]

The Supreme Court's opinions in *White v. Texas*, 310 U.S. 530 (1940), and *Ward v. Texas*, 316 U.S. 547 (1942),

[6] *See also* Irvin v. Dowd, 366 U.S. 717, 723 (1961) (competence of juror to set aside preconceived view of defendant's guilt a mixed question of law and fact); Marshall v. Lonberger, 103 S. Ct. 843, 849 (1983) (voluntariness of guilty plea a question of law).

Of course, the Court overstated its point in *Haynes* and *Stein*. In some circumstances, a state finding on an ultimate issue dispositive of a claim of federal right is treated as a fact. *E.g.*, Rushen v. Spain, 104 S. Ct. 453, 456 (1983) (per curiam) (jury bias); Maggio v. Fulford, 103 S. Ct. 2261, 2262-64 (1983) (per curiam) (competence to stand trial); *cf.* Pullman-Standard v. Swint, 456 U.S. 273, 287-88 (1982) (federal district court finding of discriminatory intent treated as fact). Each issue must be analyzed independently with an eye for the policies and considerations relevant to classification as a question of fact or law. In the case of voluntary confessions, those considerations were that police interrogations were conducted in secret, inherently coercive atmospheres, raising grave questions about what transpired during these proceedings. The Supreme Court feared time and again that claims of federal right would be defeated were the issue classified as one of fact.

are exemplars of this point. State officers in both cases conceded that they had taken the defendant on "night trips to the woods," "out off the road, *White*, 310 U.S. at 533, or "by night and day to strange towns," *Ward*, 316 U.S. at 555. They contested, however, what happened on these strange "night trips." The defendants contended that they were "beaten, whipped and burned," *Ward*, 316 U.S. at 551, "handcuffed" and "whipped," *White*, 310 U.S. at 532, and otherwise subject to physical abuse. The interrogating officers, in contrast, denied any mistreatment, avowing instead that the defendants felt a new sense of peace after these night journeys and willingly confessed. The officer's testimony in *Ward v. Texas* is illustrative: " 'We just talked to him to get that statement. Yes, sir, we just sweet talked him out of it.' " 316 U.S. at 552. The Texas courts resolved the disputed testimony in favor of the officers and purported to "find" the confessions voluntary. In order to prevent gross miscarriages of justice, the Supreme Court held while state findings of historical fact were binding on direct appeal, the ultimate issue of voluntariness is one of law.

In summary, by 1953 the Supreme Court had expressly held that in at least eighteen reported cases that the ultimate question of the voluntariness of a confession is one of law. On direct appeal to the Supreme Court this legal determination was to be made on the basis of the undisputed historical facts. The Court characterized the ultimate issue as one of law because the police interrogations at issue were conducted in secret, coercive settings, and because federal review over these proceedings would be defeated on direct appeal were the ultimate issue one of fact.

B. *Habeas Corpus Review*

In 1953 the Supreme Court examined the first coerced-confession claim to reach the Court in habeas corpus.

Brown v. Allen, 344 U.S. 443 (1953).[7] In what is now standard fare to students of habeas corpus, the Court held in *Brown v. Allen* that the scope of review of the federal courts in habeas corpus exceeds that of the Supreme Court on direct appeal. While the direct-appeal doctrine limits the Supreme Court's review to the undisputed facts of record, the 1867 Habeas Corpus Act[8] creates the power in every case to readjudicate issues of historical fact decided by the state courts. 344 U.S. at 457-64 (opinion of Reed, J.). Moreover, the Court held, in certain circumstances the federal courts were obliged to consider factual questions anew, in particular when the state courts failed to give "fair consideration to the issues and the offered evidence," *id.* at 463 (opinion of Reed, J.), and when "a vital flaw be found in the process of ascertaining" the facts by the state courts. 344 U.S. at 506 (opinion of Frankfurter, J.). However, the *Brown* Court held, conclusions of mixed law and fact are never binding in habeas corpus proceedings:

> Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts, . . . the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.

Id. at 507 (opinion of Frankfurter, J.). The Court's review of the coerced-confession claim in *Brown*—a mixed question of law and fact—was plenary. 344 U.S. at 474-76 (opinion of Reed, J.).

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[7] *Brown v. Allen* involved three consolidated habeas petitions challenging methods of jury selection on equal protection grounds. The petitioner in *Brown* itself also challenged the admission of an allegedly coerced confession. 344 U.S. at 474-76.

[8] Act of Feb. 5, 1867, ch. 28, 1, 14 Stat. 385, 385-86.

The "fair consideration" and "vital flaw" standards of *Brown v. Allen* soon proved bedevilling to the district courts.[9] In an effort to afford additional guidance on the question whether the district courts were obligated to relitigate issues of historical fact, the Supreme Court in *Townsend v. Sain*, 372 U.S. 293 (1963), refined the rules of *Brown v. Allen*. In lieu of the amorphous "fair consideration" and "vital flaw" standards of *Brown*, the Court substituted six arguably clearer standards.[10] In the event that a mandatory hearing is not required under these standards, the *Townsend* Court held, the district courts "may, and ordinarily should, accept the facts as found in the [state] hearing. But [they] need not." 372 U.S. at 318.

Congress codified the *Townsend* standards with little change in the 1966 amendments to the Habeas Corpus Act. 28 U.S.C. § 2254(d)(1)-(8) (1982); *see* Maj. op., Typescript op. at 11 n.7. The 1966 amendments retained the exception applicable when the state factual determination "is not fairly supported by the record." 28 U.S.C. § 2254(d)(8) (1982). In cases not falling within these exceptions, Congress added, state findings of historical

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[9] *See* Townsend v. Sain, 372 U.S. 293, 310 & n.8 (1963) ("It has become apparent that the opinions in *Brown v. Allen*, *supra*, do not provide answers for all aspects of the hearing problem for the lower federal courts, which have reached widely divergent, in fact often irreconcilable, results").

[10] *See* 372 U.S. at 313:

> We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

fact "shall be presumed to be correct." 28 U.S.C. § 2254 (d) (1982).

Neither *Townsend v. Sain* nor the 1966 amendments to the Habeas Corpus Act, however, altered the Supreme Court's doctrine that the federal courts sitting in habeas proceedings exercise plenary review over the ultimate legal issue in mixed questions of law and fact. The *Townsend* Court held:

> By "issues of fact" we mean to refer to what are termed basic, primary, or historical facts: facts "in the sense of a recital of external events and the credibility of their narrators . . . ." *Brown v. Allen*, 344 U.S. 443, 506 [1953)] (opinion of Mr. Justice Frankfurter). So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense.

372 U.S. at 309 n.6. As recently as May of 1984 the Court reaffirmed that the ultimate legal issue in a mixed question of law and fact is not subject to the presumption of correctness of section 2254(d). *Strickland v. Washington*, 104 S. Ct. 2052, 2070 (1984); *see Marshall v. Lonberger*, 103 S. Ct. 843, 849 (1983); *Sumner v. Mata*, 455 U.S. 591, 597 (1982) (per curiam); *Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980); *Brewer v. Williams*, 430 U.S. 387, 403-04 (1977).

Nor did the Court recede from its holdings that the voluntariness of a confession is such a mixed question of law and fact. As I note below, in over thirty decisions filed between the opinions in *Brown v. Allen* and *Sumner v. Mata*, the Supreme Court emphatically reaffirmed that voluntary-confession determinations are mixed questions of law and fact.

Thus, the evolving standards for the review of historical facts in habeas corpus proceedings had no effect on the voluntary-confession doctrine. That doctrine applied equally in direct appeals and habeas corpus, and

held that the ultimate question of the voluntariness of a confession is an issue of law.

C. *Coerced-Confession Claims from* Brown v. Allen *to* Mincey v. Arizona

As increasing numbers of coerced-confession claims pressed for the Supreme Court's attention, the Court evinced mounting concern over the circumstances of police interrogations conducted in closed-door sessions. Between 1953 and 1966, the year of *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court addressed no less than nineteen coerced-confession claims. During this period the Court reaffirmed that a confession may be extracted by psychological ploys as surely as by physical abuse. *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960);[11] *see Jackson v. Denno*, 378 U.S. 368, 389-90 (1964); *Spano v. New York*, 360 U.S. 315, 321 (1959) (as "the methods used to extract confessions [become] more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made."). In all such cases, the Court held, the legal standard for voluntariness is whether the confession is "the product of a rational intellect and a free will." *Blackburn*, 361 U.S. at 208. In the case of psychological coercion, the

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[11] The Court in *Blackburn v. Alabama* held:

> Since *Chambers v. Florida*, 309 U.S. 227 [(1940)], this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of "persuasion." A prolonged interrogation of an accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror.

361 U.S. at 206 (footnote omitted).

Court's assessment of voluntariness included consideration of the intensity and potential for deceipt of any psychological pressure employed [12] in addition to the defendant's susceptibility to such pressure, as measured by the individual's maturity,[13] education,[14] intelligence,[15] experience,[16] and physical condition.[17]

In each of these cases the Supreme Court reaffirmed that the ultimate determination of voluntariness is a mixed question of law and fact. Justice Frankfurter's encyclopedic opinion in *Culombe v. Connecticut*, 367 U.S. 568 (1961), for example, clearly distinguished between the underlying historical facts and the ultimate determination of voluntariness:

> The inquiry whether, in a particular case, a confession was voluntarily or involuntarily made involves, at the least, a three-phased process. First, there is the business of finding the crude historical facts, the external, "phenomenological" occurrences and events surrounding the confession. Second, because the concept of "voluntariness" is one which concerns a mental state, there is the imaginative recreation, largely inferential, or internal, "psychological" fact. Third, there is the application to this psychological fact of standards for judgment informed by the larger legal conceptions ordinarily characterized as rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstances.

367 U.S. at 603 (opinion of Frankfurter, J.). The first of these determinations, the Court held, is one of historical fact. *Id.* However, the Court reiterated, the second and third phases are conclusions of law. *Id.* at 604-05. Justice Frankfurter made amply clear the reason for classifying these determinations as legal conclusions:

> No more restricted scope of review would suffice adequately to protect federal constitutional rights. For the mental state of involuntariness upon which the due process question turns can never be affirmatively established other than circumstantially—that is, by inference; and it cannot be competent to the trier of fact to preclude our review simply by declining to draw inferences which the historical facts compel.

Id. at 605.

Reaffirmations of the rule that the ultimate question of voluntariness is one of law appear in every case decided during this period. *E.g.*, *Reck v. Pate*, 367 U.S. 433 (1961):

> The question whether there has been a violation of the Due Process Clause of the Fourteenth Amendment by the introduction of an involuntary confession is one which it is the ultimate responsibility of this Court to determine.

Id. at 435; *see also Haynes v. Washington*, 373 U.S. 503 (1963):

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[12] *See* Lynumn v. Illinois, 372 U.S. 528, 534 (1963) (investigators threaten defendant with loss of children); Spano v. New York, 360 U.S. 315, 321-24 (1961) (police officer, a "childhood friend" of the defendant, stated falsely that job was in jeopardy unless defendant confessed); Leyra v. Denno, 347 U.S. 556, 559-61 (1954) (use of psychiatrist).

[13] *See* Gallegos v. Colorado, 370 U.S. 49, 54 (1962); Payne v. Arkansas, 356 U.S. 560, 567 (1958); Haley v. Ohio, 332 U.S. 596, 599-601 (1948).

[14] *See* Clewis v. Texas, 386 U.S. 707, 712 (1967); Davis v. North Carolina, 384 U.S. 737, 742 (1966); Harris v. South Carolina, 338 U.S. 68, 70 (1949).

[15] *See* Culombe v. Connecticut, 367 U.S. 568, 620 (1961); Reck v. Pate, 367 U.S. 433, 441 (1961); Fikes v. Alabama, 352 U.S. 191, 193 (1957).

[16] *See* Thomas v. Arizona, 356 U.S. 390, 394 (1958); Stein v. New York, 346 U.S. 156, 185-86 (1953); Lisenba v. California, 314 U.S. 219, 233-34 (1941).

[17] *See* Townsend v. Sain, 372 U.S. 293, 307-09 (1963) (truth serum); Clewis v. Texas, 386 U.S. 707, 712 (1967).

> Our conclusion is in no way foreclosed, as the State contends, by the fact that the state trial judge or the jury may have reached a different result on this issue.
>
> It is well settled that the duty of constitutional adjudication resting upon this Court requires that the question whether the Due Process Clause of the Fourteenth Amendment has been violated by admission into evidence of a coerced confession be the subject of an *independent* termination here . . .; "we cannot escape the responsibility of making our own examination of the record," *Spano v. New York*, 360 U.S. 315, 316 [(1959)].

Id. at 515 (emphasis in original).

The Supreme Court's concern for the conduct of secret police interrogation reached a new level of acuity with the Court's incorporation of the privilege against self-incrimination as an element of due process applicable to the states through the fourteenth amendment. *Malloy v. Hogan*, 378 U.S. 1, 6-11 (1964). That concern, in turn, led to the Court's well-known decisions in *Massiah v. United States*, 377 U.S. 201 (1964), and *Escobedo v. Illinois*, 378 U.S. 478 (1964)—pressing the sixth amendment right to counsel into service to protect the privilege against self-incrimination after the onset of adversary judicial proceedings, and before their onset in the circumstances defined in *Escobedo* [18]—and *Miranda v.*

[18] *See* 378 U.S. at 490-91:

> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment . . . .

Arizona, 384 U.S. 436 (1966), requiring the recitation of warnings after the onset of custodial interrogation to enforce the privilege against self-incrimination.

The advent of these decisions enforcing the newly incorporated privilege against self-incrimination, however, did not change the Supreme Court's solicitude for scrutiny of confessions exacted by coercion. In 1978 the Court again affirmed that the ultimate question of the voluntariness of a confession is one of law. *Mincey v. Arizona*, 437 U.S. 385 (1978):

> If, therefore, Mincey's statements to Detective Hust were not " 'the product of a rational intellect and a free will,' " *Townsend v. Sain*, 372 U.S. 293, 307 [(1963)], quoting *Blackburn v. Alabama*, 361 U.S. 199, 208 [(1960)], his conviction cannot stand. In making this cri[illegible]al determination, *we are not bound by the Arizona Supreme Court's holding that the statements were voluntary. Instead, this Court is under a duty to make an independent evaluation of the record.*

Id. at 398 (emphasis added). The majority now reasons that *Mincey v. Arizona*, and each of its direct-appeal predecessors, are now overruled.

It is important to understand the reason for this conclusion and the significance of its ramifications. As the majority properly notes, there is no distinction between the definition of "fact" for purposes of direct appeal and habeas corpus. Maj. op., Typescript op. at 16 n. 12. Had the voluntariness of Mincey's confession been an ultimate question of fact, the Supreme Court would have asked only whether the Arizona courts had applied the proper legal standard—whether, under the totality of the circumstances, the defendant's will was overborne—in finding this fact. In *Mincey* there was no dispute that the Arizona courts had indeed applied the proper legal standard. If the question of voluntariness were one of ultimate fact, therefore, the Supreme Court would simply

have affirmed, noting that the proper legal standard had been applied. Instead, holding that the ultimate question of voluntariness is one of law, the Court reversed, concluding as a matter of law that the confession was involuntarily made. Thus the majority reasons, with commendable candor, that *Mincey* is overruled. Similarly, the majority concludes that the entire direct-appeal line of decisions, and the direct-appeal doctrine itself in confession cases, have been reversed *sub silentio*.

The ramifications of this holding are of the highest order. In the majority's view, the Supreme Court itself is barred on direct appeal from making an independent determination of the voluntariness of a confession. That function, again in the majority's view, is open to the federal courts only in habeas corpus, and only when a state court "finding" of voluntariness is not fairly supported by the record as a whole. Thus, all independent federal scrutiny over confessions—both on direct appeal to the Supreme Court and in habeas corpus—would be gravely impaired. It is for precisely this reason that the Supreme Court has reiterated that the ultimate question of voluntariness is a mixed question of fact and law. And it is precisely this judgment of the Supreme Court that the majority today holds has been overruled.

The majority's conclusion that this upheaval in Supreme Court jurisprudence was the work of *Miranda* is erroneous. Perhaps it is too simple to point out that the Supreme Court decided *Mincey v. Arizona* in 1978, twelve years after the Court's decision in *Miranda*. In *Mincey*, after all, *Miranda* warnings were not given;[19] it would be a sophism indeed to rely on *Miranda* as a foundation for doctrinal change when *Miranda* itself is violated. But there is no such distinction in *Hutto v.*

[19] Arizona officials in *Mincey* conceded the *Miranda* violation and sought to use the defendant's confession solely for impeachment, a use permitted by Harris v. New York, 401 U.S. 422 (1978). *See* 437 U.S. at 397-98.

Ross, 429 U.S. 28 (1976) (per curiam).[20] In *Hutto*, a habeas corpus proceeding, the defendant had received *Miranda* warnings; indeed, he had also volunteered a confession with the advice and in the presence of counsel. 429 U.S. at 29. Despite the giving of *Miranda* warnings and the presence of counsel, the Court characterizated of voluntariness of the confession as an ultimate issue of law. In particular, the Court did not apply section 2254(d) to the issue of voluntariness. The presence of counsel and giving of *Miranda* warnings were simply factors for consideration in the determination of voluntariness. *See Davis v. North Carolina*, 384 U.S. 737, 740-41 (1966).

The theory that *Miranda* worked a doctrinal upheaval in Supreme Court jurisprudence may have been grist for an advocate's brief in *Hutto* and Mincey. It is not, however, a theory open to us as a inferior federal court bound by Supreme Court precedent. And it seems at least relevant that eight Federal Circuits have rejected the theory that *Miranda* altered the Supreme Court's voluntary-confession doctrine. Each of these courts addressing post-*Miranda* events has held that the ultimate question of the voluntariness of a confession is a one of law.[21]

[20] All other post-*Miranda* confession cases decided by the Supreme Court involved events antedating the *Miranda* decision. Lego v. Twomey, 404 U.S. 477 (1972); Procunier v. Atchley, 400 U.S. 446 (1971); Frazier v. Cupp, 394 U.S. 731 (1969); Boulden v. Holman, 394 U.S. 478 (1969); Darwin v. Connecticut, 391 U.S. 346 (1968) (per curiam); Greenwald v. Wisconsin, 390 U.S. 519 (1968) (per curiam); Beecher v. Alabama, 389 U.S. 35 (1967) (per curiam); Clewis v. Texas, 386 U.S. 707 (1967); Davis v. North Carolina, 384 U.S. 737 (1966). In each of these cases the Court affirmed that the ultimate question of voluntariness is one of law without any suggestion that, had *Miranda* warnings been afforded, the issue would have been analyzed as one of fact.

[21] United States v. Castaneda-Castaneda, 729 F.2d 1360, 1362-63 (11th Cir. 1984); Williams v. Maggio, 727 F.2d 1387, 1390 & nn. 11-12 (5th Cir. 1984); Holleman v. Duckworth, 700 F.2d 391, 396

Finally, the majority's holding sends the wrong signal to law enforcement officers. Its message—obtain a *Miranda* waiver and only then employ "sophisticated modes of 'persuasion,'" *Blackburn*, 361 U.S. at 206—renders the court's reliance on the prophylaxis of *Miranda* sophistical and offensive.

To summarize, as recently as 1978 the Supreme Court confirmed what it had held on some fifty prior occasions. A confession is voluntary if it is the product of a free will and a rational intellect. The ultimate question of the voluntariness of a confession is one of law. While the historical circumstances surrounding the making of a confession are subject to the strictures of section 2254 (d), the conclusion of voluntariness is not. The presence or absence of *Miranda* warnings is simply one factor for evaluation under the totality of the circumstances.

D. *Recent Supreme Court Opinions*

"Very weighty considerations," the Court has held, "underlie the principle that courts should not lightly

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(7th Cir.), *cert. denied*, 104 S. Ct. 116 (1983); United States v. Robinson, 698 F.2d 448, 455 (D.C. Cir. 1983); United States v. Tingle, 658 F.2d 1332, 1333-36 (9th Cir. 1981); Jurek v. Estelle, 623 F.2d 929, 934-36 (5th Cir. 1980) (in banc), *cert. denied*, 450 U.S. 1001 (1981); Miller v. Maryland, 577 F.2d 1158, 1159 (4th Cir. 1978); United States v. Brown, 557 F.2d 541, 549-54 (6th Cir. 1977). The First Circuit has also recently held that the determination of voluntariness is not subject to section 2254(d), but has not addressed the issue for events arising after *Miranda*. Johnson v. Hall, 605 F.2d 577, 581-83 (1st Cir. 1979). Nothing in the First Circuit's decision, however, suggests that the court's analysis would change for post-*Miranda* events. *See also* United States v. Blenvenue, 632 F.2d 910, 913 (1st Cir. 1980) (issue analyzed as one of law for post-*Miranda*, non-custodial interrogation).

Cf. Alexander v. Smith, 582 F.2d 212, 217 (2d Cir.) (issue of fact), *cert. denied*, 439 U.S. 990 (1978); Lyle v. Wyrick, 565 F.2d 529, 532 (8th Cir. 1977) (subsidiary issues of fact presumed to have been found in conformance with legal conclusion when basis for state decision not specified), *cert. denied*, 435 U.S. 954 (1978); Castleberry v. Alford, 666 F.2d 1338, 1342 (10th Cir. 1982) (issue may be pure question of law, pure question of fact, or mixed question of law and fact).

overrule past decisions." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). The Supreme Court does not make it a practice to overrule doctrines of long standing without a reasoned explanation of its judgment. *See Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 672-77 (1982); *United States v. Reliable Transfer Co.*, 421 U.S. 397, 401-11 (1975); *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 240-53 (1970); *Moragne*, 398 U.S. at 403-05. This settled practice notwithstanding, the majority today holds that three recent Supreme Court decisions overruled *sub silentio* almost half a century of Supreme Court precedent on voluntary confessions. These cases had no such purport.

The first of these decisions, *Marshall v. Lonberger*, 103 S. Ct. 843 (1983), examined the voluntariness of a plea of guilty. The Supreme Court held:

> We entirely agree with the Court of Appeals for the Sixth Circuit that the governing standard as to whether a plea of guilty is voluntary for purposes of the federal Constitution is a question of federal law . . . . and not a question of fact subject to the requirements of 28 U.S.C. § 2254(d). But the questions of historical fact which have dogged this case from its inception—what the Illinois records show with respect to respondent's 1972 guilty plea, what other inferences regarding those historical facts the Court of Appeals for the Sixth Circuit could properly draw, and related questions—are obviously questions of "fact" governed by the provisions of § 2254(d).

103 S. Ct. at 849. *Marshall* obviously undermines any suggestion that the Court had receded from its view that the ultimate question of the voluntariness of a confession is one of law. To be sure, the Court noted that "inferences regarding those historical facts" are governed by section 2254(d). But the voluntariness of a guilty plea, the Court expressly held, is not such an inference.

Moreover, the policies that moved the Supreme Court to characterize the voluntariness of a confession as an ultimate issue of law are absent in the case of a plea of guilty. The Court has never reasoned superficially that the "voluntariness" of a confession concerns a "state of mind" and that all issues of "state of mind" could be classified *a priori* as either "fact" or "legal conclusion." Our legal characterizations have deeper truths. The Court describes the voluntariness of a confession as a legal issue because confessions are the product of police interrogation generally conducted in closed proceedings and inherently coercive settings. The truth is difficult to penetrate in these proceedings: in order to prevent the shielding of claims of federal right on direct appeal to the Supreme Court, the Court retained a measure of power to draw independent inferences from the historical facts of record. But no such circumstances are present during the allocution of a guilty plea. These pleas are entered in open court under prescribed conditions with the benefit of counsel and with a full stenographic record of the allocution. Nothing could be further from the inherently coercive setting of secret police interrogation. Thus the need for independent federal review of the voluntariness of guilty pleas is less acute than that for confessions obtained during police interrogation. And yet the Supreme Court in *Marshall* reaffirmed that the voluntariness of even a guilty plea entered in open court is a mixed question of law and fact. If *Marshall v. Lonberger* speaks at all to voluntary confessions, it counsels more strongly than ever that the voluntariness of a confession is an ultimate issue of law.

The remaining two cases on which the majority relies—*Rushen v. Spain*, 104 S. Ct. 453 (1983) (per curiam), and *Maggio v. Fulford*, 103 S. Ct. 2261 (1983) (per curiam)—also do not affect the voluntary-confession doctrine. Both of these cases are per curiam summary reversals decided without briefing or argument; it would be extraordinary, to say the least, if the Supreme

Court intended two per curiam summary dispositions to overrule a half century of Supreme Court doctrine. But of course they do not. Neither case addresses the voluntariness of a confession. *Maggio* arguably holds that a defendant's competence to stand trial is an issue of fact subject to section 2254(d), notwithstanding the contrary holding of *Drope v. Missouri*, 420 U.S. 162, 174-75 & n. 10 (1975). Like the entry of a guilty plea, however, the defendant's competence to stand trial is adjudicated in open court after a competence hearing. *Pate v. Robinson*, 383 U.S. 375, 385-86 (1966). The trial court witnesses all of these proceedings and renders credibility findings; counsel is generally present unless that right is waived; and a stenographic record is prepared for the purpose of appellate review. The policies requiring a measure of independent federal scrutiny over confessions obtained during secret police interrogation apply with far less force to the determination of the competence of a witness to stand trial made after a *Pate* hearing.

Rushen holds that the effect of *ex parte* communications on the impartiality of a juror is a question of fact subject to section 2254(d). This unremarkable conclusion is wholly consistent with the voluntary-confession doctrine. Although such *ex parte* communications do take place outside of the presence of the trial court, they do not occur in the inherently coercive setting of police interrogation and, more importantly, do not implicate the danger of self-incrimination of the defendant. The need for independent federal scrutiny of the impact of *ex parte* communciation on the jury is far more attenuated than that appropriate to the confession of a defendant offered at trial. In drawing this conclusion the *Rushen* Court nowhere even alluded to the voluntary-confession doctrine.

In short, the suggestion that *Marshall*, *Maggio*, and *Rushen* overruled the voluntary-confession doctrine *sub silentio* is simply ludicrous. That doctrine retains the vitality it has enjoyed for almost fifty years. It may be

the prerogative of a majority of the Supreme Court "to overrule, *sub silentio*, a century of precedents," as Justice Roberts put it. *James v. Dravo Contracting Co.*, 302 U.S. 134, 161 (1937) (Roberts, J., dissenting). It is not, however, within the power of this court. We undermine the "public faith in the judiciary as a source of impersonal and reasoned judgments," *Moragne*, 398 U.S. at 403, by abandoning such a longstanding judicial practice on so patently baseless a ground. The court's holding raises the gravest questions respecting adherence to the principle of *stare decisis* and concerning the appropriate role of an inferior federal tribunal in deeming so weighty a Supreme Court doctrine overthrown by so meager a force.

To the extent that *Patterson v. Cuyler* reasoned that *Marshall*, *Maggio*, and *Rushen* overruled the voluntary-confession doctrine, it reasoned incorrectly. *Patterson*'s holding, however, is merely that the voluntariness of a *Miranda* waiver is an issue of fact.[22] As such, it would not control our decision here even if the Supreme Court had been silent on the issue of voluntary confessions. *Miranda* waivers, of course, are generally obtained in closed proceedings. But there the similarity to confes-

[22] Even this holding appears to be infirm. By so holding, *Patterson* places this Circuit in conflict with Edwards v. Arizona, 451 U.S. 477, 484-87 (1981). *Edwards*, a direct appeal to the Supreme Court, does not treat the validity of a *Miranda* waiver as a question of fact. Although the Arizona Supreme Court in *Edwards* applied an erroneous legal standard for assessing voluntariness—the court applied the fourth amendment standard of Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973), rather than the standard of Johnson v. Zerbst, 304 U.S. 458 (1938)—the Supreme Court also held as a matter of law that on the historical facts presented, the defendant's statement "did not amount ot a valid waiver." 451 U.S. at 486-87. Thus, *Edwards* treats the ultimate question of the validity of a *Miranda* waiver as a conclusion of law.

Unfortunately, *Patterson* does not cite or distinguish *Edwards*. Because no petition for rehearing in *Patterson* was filed, the panel opinion's consistency with *Edwards* has not been addressed by this Circuit.

sions ends. A *Miranda* waiver is not inculpatory; rather, it is an agreement to accede to questioning until the permission is withdrawn. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). The policies requiring independent federal review of confessions exacted during police interrogation do not apply with equal force to a mere permission to begin questioning. And as a practical matter, *Miranda* waivers are generally evinced by signed writings. When a *Miranda* waiver is effected not by such a writing but by a defendant's unilateral statement to the police, *Edwards* holds that the validity of the waiver is a mixed question of law and fact. *See* note 22 *supra*. *Patterson* makes no effort to reconcile its conclusion with this aspect of the Supreme Court's holding in *Edwards*.

The majority suggests that *Patterson*'s reading of the "trend" of recent Supreme Court decisions has been reinforced by the Court in *Patton v. Yount*, —— U.S. ——, 52 U.S.L.W. 4896 (U.S. June 26, 1984). Quite to the contrary, *Patton* directs the opposite conclusion. In *Patton* the Court held that the bias of a single juror is an issue of fact. 52 U.S.L.W. at 4899-4900. The Supreme Court arrived at that conclusion only after assessing the relevant reasons for categorization of the issue as a question of fact or law. The Court held:

> There are good reasons to apply the statutory presumption of correctness to the trial court's resolution of these questions. First, the determination has been made only after an often extended *voir dire* proceeding designed specifically to identify biased veniremen. It is fair to assume that the method we have relied on since the beginning . . . usually identifies bias. Second, the determination is essentially one of credibility, and therefore largely one of demeanor. As we have said on numerous occasions, the trial court's resolution of such questions is entitled, even on direct appeal, to "special deference." . . . The

respect paid such findings in a habeas proceeding certainly should be no less.

52 U.S.L.W. at 4900.

These policies do not and never have applied to an assessment of the voluntariness of a confession. The task at hand is not an assessment of an individual's present state of mind. Rather, the issue is whether, during a past closed proceeding, an individual's will was overborne. This is not a determination of demeanor; it is not the case that the defendant testifies that his will overborne, the officers testify that his will was not overborne, and the trial court, assessing their demeanor, finds who is telling the truth. The determination of voluntariness requires the drawing of inferences from past events and circumstances. Those circumstances and events, of course, are "facts"—the "external, 'phenomenological' occurrences and events surrounding the confession," as Justice Frankfurter put it. *Culombe*, 367 U.S. at 603. But the inference whether the defendant's will was overborne is an independent conclusion. The fact-finder is not present during the giving of the confession. The defendant's voice is not heard. The interrogators' mei are not seen. The fact-finder seeks instead to reconstruct the defendant's mental state after developing a record. The reviewing court is as capable of drawing that inference from the cold facts as is the trial court. *Patton*'s holding concerning juror bias, measured in court after a searching *voir dire*, consequently sheds no illumination on whether the voluntariness of a confession obtained during interrogation is an inference of fact or law. And *Patton*'s admonition to attend to the purposes served by classification of an issue as "fact" or "law" detracts from the majority's position. The Supreme Court characterizes a confession's voluntariness as an ultimate question of law because federal review over custodial police interrogation would be frustrated if the ultimate issue were a pure question of fact.

Thus, even if we were writing on a clean slate, *Patterson*'s holding concerning *Miranda* waivers would not compel the same holding for voluntary confessions. Significantly different policies and circumstances pertain to these issues. But of course we are not writing on a clean slate. A half century of unwaivering Supreme Court precedent already compels the conclusion that the voluntariness of a confession is an ultimate issue of law.

IV.

Finally, I dissent from the majority's deference to a finding of "fact" that the New Jersey courts neither made nor purported to make. Applying the voluntary-confession doctrine, those courts treated their conclusion of voluntariness as one of law. The premise for deference under section 2254(d) to a state finding of fact is therefore altogether wanting.

The state trial court made a number of findings of historical fact. For example, the court observed that Miller had been "at the police barracks about almost two hours before this questioning started during which time I find from the testimony was not interrogated about this situation." Tr. at 145; *see* note 1 *supra*. The court treated the issue of voluntariness, in contrast, as one of law. "I think that the interview conducted by Detective Boyce meets the requirements of our law," the trial court held. Tr. at 146. "I don't consider that the offers of help made by Detective Boyce were such that they . . . overcame the will of the defendant which would make this confession involuntary." The court's reliance on *State v. Puchalski*, 45 N.J. 97, 100-01, 211 A.2d 370, 372 (1965), and *Schneckloth v. Bustamonte*, 412 U.S. 218, 223-27 (1973), clearly indicate that the trial court regarded this determination as a legal conclusion.

Similarly, in its unanimous reversal of the trial court, the New Jersey Appellate Division held that the trial court's conclusion was one of law. Under New Jersey law, the findings of the trial courts are binding on appeal unless they suffer, for example, from a "manifest lack of inherently credible evidence to support the finding, [or an] obvious overlooking or under evaluation of crucial evidence." *State v. Johnson*, 42 N.J. 146, 162, 199 A.2d 809, 818 (1964). Applying this standard, the Appellate Division sustained the trial court's findings of historical fact. "[T]he judge found," the court held, "in findings adequately supported by credible evidence in the whole record (*State v. Johnson*, 42 N.J. 146 (1964)), that *Miranda* warnings were given and in a timely manner." 76 N.J. at 413, 388 A.2d at 228. The Appellate Division did not, however, apply the *State v. Johnson* standard of appellate review to the trial court's conclusion of voluntariness. Rather, after reciting the trial court's conclusion of law, the Appellate Division held that "We are clearly persuaded of error in this determination." *Id.*

In like fashion, the New Jersey Supreme Court treated the trial court's conclusion as one of law. "We have no quarrel," that court held,

> with the legal principles expressed by the Appellate Division. We disagree, though, with its evaluation of the techniques and tactics used by the officer who questioned [the] defendant, as well as its conclusion that defendant's confession was involuntary in the constitutional sense.

76 N.J. at 402, 388 A.2d at 223. The dissent, in a discussion with which the majority did not take issue, was even more explicit. "As to the scope of appellate review," the dissenting opinion observed, "since the issue is of constitutional dimension and is one of mixed fact-law, the reviewing court conducts a sweeping surveillance of the question practically the equivalent of *de novo* redetermination." 76 N.J. at 411-12, 388 A.2d at 228 (footnote omitted). In the case of "contested issues as to subordinate facts involving credibility of witnesses," the court added, "deference may be accorded any fact-findings thereon by the trial judge." *Id.* at 412 n. 1, 388 A.2d at 228 n. 1.

Thus, all eleven New Jersey judges who reviewed this confession held that the determination of the voluntariness of Miller's confession is one of law. Yet in disregard of these legal conclusions, the majority today recharacterizes their holding as one of "fact." Section 2254(d) does not require that we ignore the legal conclusions of the state courts in this fashion. That section provides that "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be presumed to be correct" unless one of the exceptions set forth in that section is established. 28 U.S.C. § 2254(d) (1982). Because none of the state courts even purported to treat the ultimate question of voluntariness as one of fact, there is no basis for deferring to any such factual conclusion under section 2254(d).

V.

"Nothing that we write," as Justice Stevens has put it, "no matter how well reasoned or forcefully expressed, can bring back the victim of this tragedy . . . ." *Brewer v. Williams*, 430 U.S. 387, 415 (1977) (Stevens, J., concurring). But the tragic circumstances of the crime before us cannot diminish our respect for constitutional principle. A conviction obtained by a confession exacted by coercion, whether psychological or physical, violates due process. Miller's confession was the product of a will overborne by deceipt, trickery, and promises of help if only he would confess. Confess he did, in an overwrought physical state requiring medical attention. A confession extracted by those psychological ploys from a defendant of unstable mental disposition and childlike maturity

after an intense grilling cannot be squared with due process.

Rather than meet our responsibility to examine the voluntariness of Miller's confession independently, however, the majority characterizes this determination as a question of "fact" and purports to defer to state "findings on this issue—findings, of course, that were never made, for the New Jersey courts faithfully adhered to the Supreme Court's consistent holding that the voluntariness of a confession as an issue of law. The majority's decision is squarely inconsistent with almost half a century of Supreme Court precedent. We have no power to treat so cavalierly the reasoned decisions of some fifty Supreme Court precedents: we certainly have no warrant for supposing that they have been overruled *sub silentio* by two summary per curiam dispositions of the Supreme Court addressing other issues.

I cannot join in this judgment. I dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5530

FRANK M. MILLER, JR., APPELLANT

v.

PETER J. FENTON, Superintendent,
Rahway State Prison;
IRWIN I. KIMMELMAN, Attorney General,
State of New Jersey, APPELLEES

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*, and ATKINS, *District Judge**

The petition for rehearing filed by Frank M. Miller, Jr., Appellant, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judges Gibbons and Garth would grant the petition for rehearing.

By the Court,

/s/ Edward R. Becker
Judge

Dated: September 28, 1984

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* As to panel rehearing only.

SUPREME COURT OF THE UNITED STATES

No. 84-5786

FRANK M. MILLER, JR., PETITIONER

v.

PETER J. FENTON, Superintendent,
Rahway State Prison, et al.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 1, 1985

PETITIONER'S

BRIEF

No. 84-5786

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK M. MILLER, JR., *Petitioner,*
v.
PETER J. FENTON, Superintendant,
Rahway State Prison, and
IRWIN I. KIMMELMAN, Esq., Attorney General,
State of New Jersey, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF OF PETITIONER

THOMAS S. SMITH
Acting Public Defender of New Jersey
PAUL MARTIN KLEIN*
Assistant Deputy Public Defender
CLAUDIA VAN WYK
Assistant Deputy Public Defender
Office of the Public Defender
Appellate Section
20 Evergreen Place
East Orange, New Jersey 07018
(201) 266-1800
Counsel for Petitioner
**Counsel of Record*

QUESTIONS PRESENTED

I. Whether the Court of Appeals used the presumption of correctness in 28 U.S.C. §2254(d) to deprive petitioner of his statutory right to plenary federal judicial review of the voluntariness of his confession?

II. Whether petitioner's confession was involuntarily obtained by police practices which operated to overbear his will?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at *Miller* v. *Fenton*, 741 F.2d 1456 (3d Cir. 1984) and appears in the Joint Appendix at JA 108 through JA 166. The opinion of the United States District Court for the District of New Jersey is unreported and appears at JA 104 through JA 106. The opinion of United States Magistrate John W. Devine is unreported and appears at JA 98 through JA 103.

The opinion of the Supreme Court of New Jersey appears at *State* v. *Miller*, 76 *N.J.* 392 (1978), and is printed in the Joint Appendix at JA 55 through JA 97. The opinion of the Superior Court of New Jersey, Appellate Division, is unreported and appears at JA 39 to JA 54.

JURISDICTION

On August 17, 1984, the United States Court of Appeals for the Third Circuit affirmed the United States District Court's denial of petitioner's Petition for a Writ of Habeas Corpus. Petitioner filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* which was denied on September 28, 1984. A petition for *certiorari* was timely filed on November 21, 1984.

The jurisdiction of this Honorable Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1), with *certiorari* to the United States Court of Appeals for the Third Circuit having been granted on April 1, 1985.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amend. XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

28 U.S.C. § 2254(d):

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State Court was erroneous.

STATEMENT OF THE CASE

The petitioner, Frank M. Miller, Jr., was indicted by the Hunterdon County, New Jersey, Grand Jury for the murder of Deborah S. Margolin. Before trial, petitioner moved to suppress statements he had given to the police as having been involuntarily made in violation of his right to due process of law. U.S. Const., Amend. XIV.

At the suppression hearing it was established that Trooper Robert M. Scott and Detective Charles R. Boyce, both of the New Jersey State Police, interviewed petitioner at approximately 10:50 p.m. on August 13, 1973, the date of the homicide, at petitioner's place of work. (T57-1 to 16; T59-14 to 16) Their discussion centered on the murder and the officers inquired about petitioner's knowledge of the incident. (T58-25 to T59-16) After 50 minutes of inquiry, the officers asked Miller to accompany them to the Flemington Police Barracks for further questioning.* He agreed (T57-20 to 58-5), and spent approximately 75 minutes under Scott's guard in the barracks' kitchen. Scott maintained that they did not discuss Margolin's death. (T58-6 to 21; T59-22 to 25) Petitioner was shown a card containing the *Miranda* warnings prior to the questioning at the police bar-

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*Both interviews were taped, and a transcript of the second, held at the Flemington Police Barracks, appears in the appendix at JA 4 to JA 38.

racks. He signed the card after looking at the warnings. (T75-24 to T76-7; T77-2 to T78-2)

Throughout the interrogation, Boyce used lies as well as express and implied promises to induce petitioner to confess. Early in the interview Boyce said that the victim had just died to support another officer's earlier inducement to confess, namely, that she was still alive and could identify her attacker. (JA 16; T109-1 to 4) At trial, the detective admitted that he had known the victim was dead since seven o'clock that night. (T305-4 to 5) Similarly, Boyce told petitioner that he had been identified as being at the Margolin home earlier in the day. In fact, he had not been identified. (JA 17; T169-18 to 24) He also told petitioner that blood stains had been found on his front stoop. (JA 12) No such evidence was introduced at trial.

Detective Boyce made repeated references, during his interrogation, to petitioner's mental "problem" to induce him to confess. Over and over, he told petitioner that he was not a "criminal" because he had a problem. (JA 13, 14, 15, 16, 22, 28, 29) Boyce persistently assured petitioner that he was not responsible for his actions and that he would receive help, not incarceration, for confessing:

Boyce: Frank, look you want, you want help, don't you, Frank?

Miller: Yes, uh huh, yes, but yet I'm, I'm not going to admit to something that, that I wasn't involved in.

B. We don't want you to, all we want you to do is talk to me, that's all. I'm not talking about admitting to anything, Frank. I want you to talk to me. I want you to tell me what you think. I want you to tell me how you think about this, what you think about this?

M. What I think about it?
B. Yeah.

M. I think whoever did it really needs help.

B. And that's what I think and that's what I know. They don't, *they don't need punishment, right? Like you said, they need help?*

M. Right.

B. *They don't need punishment. They need help, good medical help.*

M. That's right.

B. . . . to rectify their problem. *Putting them in, in a prison, isn't going to solve it, is it?*

M. No sir. I know, I was in there for three and a half years.

* * *

B. Now, don't you think it's better if someone knows that he or she has a mental problem to come forward with it and say, look, I've, I've, I've done these acts, I'm responsible for this, but I want to be helped, *I couldn't help myself, I had no control of myself and if I'm examined properly you'll find out that's the case.* Is that right or wrong.

(JA 17 to 19; emphasis supplied)

Boyce then attempted to convince petitioner, contrary to petitioner's inclinations, that the real responsibility lay with the inadequate psychiatric treatment that he had received as a condition of parole. (JA 19, 20) He specifically promised to get psychiatric treatment for petitioner if he would confess, then returned to his arguments that petitioner was not responsible for his actions and was not a criminal. (JA 21, 22)

The tape of the confession reveals petitioner sobbing thirty minutes into the interrogation, distraught, weak, and unstable. The interrogation ended abruptly when petitioner entered into a "state of shock" and collapsed. Unable to revive petitioner, the police summoned an ambulance and had Mr. Miller transported to a hospital. (T84-3 to T85-17) Petitioner could later remember nothing of the police barracks interview. (T108-11 to 109-9) At the time of the interrogation petitioner

was thirty-three years old with a ninth grade education. (T106-23 to 107-8) He had been convicted of a crime in 1969 and arrested recently for a violation of parole on another crime. (T78-12 to 21) He had undergone psychiatric treatment before his original incarceration and had been evaluated by psychiatrists once in prison and two or three times after his release. (T114-13 to 24) The detective interrogating petitioner was aware of petitioner's background. (T78-12 to 21)

The trial court found that petitioner had not been wrongfully induced into confessing and that his will had not been overborne. Accordingly, the statements made at the police barracks were held admissible at trial. (T142-20 to T147-3)

At trial, it was established that Deborah Margolin, seventeen years old, lived with her parents and three brothers on a farm in East Amwell Township, New Jersey. (T155-9 to 156-14) On the morning of August 13, 1973, she was sunbathing on the patio of the farmhouse. Her brothers, Daniel and Bernard, were in the house and observed the events that followed from upstairs windows overlooking the patio.

At about 11:30 a.m. a white car drove up the driveway and sounded the horn several times. The car was dusty, had its trunk tied shut, and had two severe dents in its side. (T166-10 to 17; T167-4 to 11; T179-1 to 180-16) Deborah approached the driver, who told her that a heifer was loose at the bottom of the driveway. He left after she declined his offer of help; she then drove down the driveway herself in a family car. (T167-23 to 168-24; T169-13 to 16) Neither brother could identify the man who had driven onto the farm. (T169-18 to 24)

Later that afternoon, when Deborah failed to return home, a search of the area was made. Her father found her body in a nearby creek with her throat slashed. (T157-7 to 162-23)

Petitioner's car had matched the description given by the victim's brothers, and later that night Detectives Boyce and Doyle interviewed petitioner in the parking lot of the factory where he worked. (T211-1 to 212-7; T272-7 to 13) Later he

accompanied them to the Flemington Police Barracks, where he made the statement now at issue. Although both statements had been recorded, the jury heard only a redacted portion of the second. (T288-15)

The jury convicted Mr. Miller of murder in the first degree (T511-8 to 19), and he was sentenced to life imprisonment.

The Appellate Division of the New Jersey Superior Court reversed petitioner's conviction, holding the statements involuntary. (JA 39 to 54) The New Jersey Supreme Court, after two arguments, reversed the decision of the Appellate Division. It held, in a four-to-three decision, that the statements had not been obtained in violation of petitioner's right to due process. (JA 55 to 97) Mr. Miller then petitioned for a writ of *habeas corpus* in the United States District Court for the District of New Jersey. On February 23, 1983, United States Magistrate John W. Devine recommended that petitioner's application be dismissed, but with a certificate of probable cause. (JA 98 to 103) On June 17, 1983, the District Court filed an order and opinion dismissing petitioner's application without an evidentiary hearing but granting a certificate of probable cause. (JA 104 to 106) Petitioner timely filed a Notice of Appeal. The Court of Appeals for the Third Circuit affirmed, with one Judge dissenting, on August 17, 1984. (JA 108 to 166) A timely petition for rehearing *en banc* was denied on September 28, 1984. (JA 167) A petition for *certiorari* was timely filed on November 21, 1984, and was granted by this Court on April 1, 1985. (JA 168)

SUMMARY OF ARGUMENT

1. The Court of Appeals for the Third Circuit erroneously characterized the question of the voluntariness of a confession as one in which federal courts must defer to state courts' findings. The decision has in effect held that over fifty precedents of this Court have been overruled *sub silentio* and conflicts with decisions of Courts of Appeals in eight circuits.

This Court has historically treated voluntariness as a mixed or pure question of law subject to plenary review on direct

appeal (*Brown* v. *Mississippi*, 297 U.S. 278 (1936); *Chambers* v. *Florida*, 309 U.S. 227 (1940)) or on writ of *habeas corpus* (*Brown* v. *Allen*, 344 U.S. 443 (1953); *Townsend* v. *Sain*, 372 U.S. 293 (1963)). This Court has never treated voluntariness as a question of fact on either direct or *habeas* review, and the constitutionally required test on the merits—the totality of the circumstances—necessarily makes voluntariness a mixed question of which federal courts must be afforded independent review and judgment. Any holding to the contrary would be in direct conflict with all preceding Supreme Court decisions which have addressed the issue as well as with congressional intent expressed in the statute governing *habeas corpus*. Moreover, the Court of Appeals' reasons for treating voluntariness as a question subject to deference do not withstand analysis. The opinions relied upon by the Court of Appeals in support of its holding—*Maggio* v. *Fulford*, 103 S.Ct. 2261 (1963), *Marshall* v. *Lonberger*, 459 U.S. 422 (1983), and *Rushen* v. *Spain*, 104 S.Ct. 453 (1983)—were misread. None of the cases held mixed questions subject to the presumption of correctness. Each explicitly applied the presumption to questions of fact.

An affirmance of the Court of Appeals' decision would deprive federal *habeas* courts (and seemingly this Court on direct review) of their power to review the voluntariness of confessions except in a few exceptional cases. The federal courts' duty to enforce the Constitution therefore requires this Court to reverse.

2. Examination of the transcript as well as the actual tape recording of petitioner's confession, leaves no doubt that the confession was the result of tremendous psychological pressure so strong as to culminate in petitioner's complete physical and psychological collapse. The Court of Appeals sanctioned the use at trial of a statement obtained by employing tactics which included lies regarding incriminating evidence, misrepresentations as to the true role of the interrogating officer, express promises of psychiatric help, implied promises of legal exculpation and continuous pressure to confess—a statement which

was clearly not the result of free and unconstrained will. *Schneckloth* v. *Bustamonte*, *412 U.S. 216 (1973)*; *Culombe* v. *Connecticut*, 567 U.S. 568 (1961).

The Third Circuit's legitimization of the skillful techniques of the interrogating detective in this case rewards the interrogator who is clever or devious enough to avoid brutality and allows law enforcement personnel to circumvent the mandates of this Court.

ARGUMENT

I.

THE COURT OF APPEALS' USE OF THE PRESUMPTION OF CORRECTNESS IN 28 U.S.C. § 2254(d) DEPRIVED PETITIONER OF HIS STATUTORY RIGHT TO PLENARY FEDERAL JUDICIAL REVIEW OF THE VOLUNTARINESS OF HIS CONFESSION.

The facts in this case have never been in dispute. A complete tape recording and transcript (JA 4 to 38) conclusively establish all relevant facts except for a few uncontroverted items such as petitioner Miller's age, record, psychiatric background, and loss of consciousness immediately after interrogation. Mr. Miller has contended throughout these proceedings that the totality of these undisputed circumstances rendered his confession involuntary as a matter of law and that its admission in evidence therefore violated his right to due process of law. U.S. Const. Amend. XIV. Yet the Court of Appeals for the Third Circuit abdicated its duty to decide this mixed question of law and fact by deferring to the New Jersey Supreme Court's holding on the voluntariness question as a finding subject to the presumption of correctness set forth in 28 U.S.C. § 2254(d). The decision in effect held that over fifty precedents of this Court had been overruled *sub silentio*, and it conflicted with decisions by Courts of Appeals in eight circuits. An affirmance would deprive federal *habeas* courts (and seemingly this Court on direct review) of their power to review the voluntariness of confessions except in a few exceptional cases. The federal

courts' duty to enforce the Constitution therefore requires this Court to reverse.

A. This Court Has Long Treated Voluntariness As A Mixed Or Pure Question Of Law Subject To Plenary Review On Direct Appeal Or Writ Of *Habeas Corpus*.

1. The Constitutionally Required Test On The Merits, The Totality Of The Circumstances, Necessarily Makes Voluntariness A Mixed Question.

Whether a confession is voluntary is necessarily a mixed question. The test for voluntariness is whether, under the totality of the circumstances, the defendant's will has been "overborne" and his "capacity for self-determination critically impaired." *Culombe* v. *Connecticut*, 367 U.S. 568, 602 (1961). Among the "totality" of factors considered are the defendant's age, education, and intelligence; his previous exposure to the criminal justice system; whether his interrogators informed him of his constitutional rights; the length of detention; whether and how long the detention was incommunicado; the duration and repetition of periods of questioning; and the use of physical abuse or deprivation of food, sleep, or medicine. *Schneckloth* v. *Bustamonte*, 412 U.S. 216, 226 (1973); *Haley* v. *Ohio*, 332 U.S. 596, 598 (1948); *Lyons* v. *Oklahoma*, 322 U.S. 596, 604 (1944); *Chambers* v. *Florida*, 309 U.S. 227, 238 (1940). This Court has also considered whether law enforcement officers promptly brought defendant before a magistrate, *Culombe*, 367 U.S. at 601, and whether they extracted the confession through threats or promises. *Hutto* v. *Ross*, 429 U.S. 28, 30 (1976).

Thus voluntariness is by definition a mixed question. A court must look to a mixture of elements—the totality of the circumstances—to resolve it. Some elements, like defendant's intelligence, are subjective and closely tied to the historical facts. However, others, like the duration of questioning or the use of promises, are prescriptive and involve regulation of police behavior. To characterize the voluntariness inquiry as purely factual would radically narrow it to only a few of its elements.

If anything, since it first addressed the issue, the Court has focused primarily on evaluating interrogation techniques as a matter of law rather than on assessing the defendant's state of mind. In the earliest confession cases, *Brown* v. *Mississippi*, 297 U.S. 278 (1936), and *Chambers* v. *Florida*, 309 U.S. 227 (1940), this Court's voluntariness determination rested on its legal view of confessions extracted by the "techniques" of hanging, beating and incognito questioning. In *Chambers*, 309 U.S. at 228, the State of Florida argued that voluntariness was a question of fact finally determined by a jury. This Court rejected the claim because of its obligation to make certain that police practices conformed with the Constitution:

> Since petitioners have seasonably asserted the right under the Federal Constitution to have their guilt or innocence of a capital crime determined without reliance upon confessions obtained by means proscribed by the due process clause of the Fourteenth Amendment, we must determine independently whether petitioner's confessions were so obtained, by review of the facts upon which that issue necessarily turns.

Id. at 228-29; *accord*, *Haynes* v. *Washington*, 373 U.S. 503, 514 (1963). The requirement that law enforcement officers must obey the law has always constituted an independent reason for rejecting involuntary confessions:

> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. Accordingly, the actions of police obtaining confessions have come under scrutiny in a long series of cases.

Spano v. *New York*, 360 U.S. 315, 320-21 (1959); *accord*, *Jackson* v. *Denno*, 378 U.S. 368, 386 (1964); *Rogers* v. *Richmond*, 365 U.S. 534, 540-41 (1961). In other words, the rule excluding involuntary confessions aims not only at trustworthiness but also at deterring lawless conduct. *Lego* v. *Twomey*, 404 U.S. 477, 484-85, 488-89 (1972).

Even the subjective elements in the totality equation are not purely factual, because they usually involve inferences from external events. In *Culombe*, 367 U.S. at 603, Justice Frankfurter observed that the voluntariness determination is a "three phased process" involving, first, finding the "crude historical facts," second, the "imaginative recreation" of defendant's mental state, and, third, the application of legal standards which themselves derive from generalizations about factual circumstances.

> The second and third phases of the inquiry—determination of how the accused reacted to the external facts, and of the legal significance of how he reacted—although distinct as a matter of abstract analysis, become in actual practice inextricably interwoven. . . . The notion of "voluntariness" is itself amphibian. It purports at once to describe an internal psychic state and to characterize that state for legal purposes.

Id. at 604-05. Similarly, in *Watts* v. *Indiana*, 338 U.S. 49 (1949), where the defendant confessed after prolonged interrogation, the Court observed that the term "issue of fact"

> is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights.

Id. at 51.

Therefore, any construction of the voluntariness inquiry as purely factual discards a substantial number of the many factors considered under the constitutionally required test: the totality of the circumstances. By failing to apply the proper test of voluntariness, such a construction itself deprives defendant of due process of law. *See Rogers* v. *Richmond*, 365 U.S. at 543-44 (test of voluntariness which improperly considered the statement's truth or falsity deprived defendant of due process of law).

2. This Court Has Never Treated Voluntariness As A Question Of Fact On Either Direct Or *Habeas* Review.

In addition to the above, pure factual construction of the voluntariness inquiry abandons the delicate balance, developed in voluntariness cases in particular and *habeas corpus* cases in general, between the state courts' prerogative to find facts and federal courts' duty to enforce constitutional law. The earliest voluntariness cases reached the Court on *certiorari* or appeal from the hignest state courts.[1] In *Brown* v. *Mississippi*, 297 U.S. 278, 281-85 (1936), no factual dispute existed, because the State's witnesses boldly admitted whipping both defendants and hanging one of them to make them talk. In *Chambers* v. *Florida*, 309 U.S. at 238, however, the police denied using any physical violence. This Court nevertheless held the confession involuntary in violation of due process because, even aside from any violence, the record showed without conflict that they had used dragnet arrest methods and protracted incognito questioning. *Id.* at 238, 241. The Court took the same approach repeatedly, making an "independent determination" of voluntariness on the basis of the undisputed facts in the record. *Thomas* v. *Arizona*, 356 U.S. 390, 393 (1958).

> Enforcement of the criminal laws rests primarily with the state courts, and generally their findings of fact, fairly made upon substantial and conflicting testimony as to the circumstances producing the contested confession—as distinguished from inadequately supported findings or conclusions drawn from uncontroverted happenings—are not this Court's concern; yet when the claim is that the prisoner's confession is the product of coercion we are bound to make our own examination of the record to determine whether the claim is meritorious.

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[1] For a comprehensive discussion of the history of voluntariness as a question of law in this Court, see Judge Gibbons' dissent in the Court of Appeals, 741 F.2d 1456, 1472-84 (1984) (JA 139 to 163).

Payne v. *Arkansas*, 356 U.S. 560, 561-62 (1958). On twenty-three occasions this Court's opinions have explicitly distinguished the constitutional issue of voluntariness from the "undisputed facts," for which it relied on the state courts.[2] The Court nevertheless emphasized its obligation to make an "independent examination" of the record.[3] Occasionally the Court even overrode inadequately supported state fact findings. *E.g.*, *Blackburn* v. *Alabama*, 36 U.S. 199, 208 (1960) (opinion of single state psychiatrist overridden where it was so inconsistent internally that it raised "no genuine issue of fact"); *cf.* *Lisenba* v. *California*, 314 U.S. 219, 238 (1941) (state fact-finding accepted unless so lacking in support that it violates due process).

The first coerced confession cases to reach the Court in *habeas corpus* broadened and refined the federal courts' fact-finding power. *Brown* v. *Allen*, 344 U.S. 443 (1953), held that the 1867 Habeas Corpus Act creates the power to readjudicate state court fact findings where the state court failed to give

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[2] *Greenwald* v. *Wisconsin*, 390 U.S. 519, 521 (1968) (per curiam); *Beecher* v. *Alabama*, 389 U.S. 35, 36 (1967) (per curiam); *Clewis* v. *Texas*, 386 U.S. 707, 708-09 (1967); *Garrity* v. *New Jersey*, 385 U.S. 493, 499 n.2 (1967); *Haynes* v. *Washington*, 373 U.S. 503, 507 (1963); *Culombe* v. *Connecticut*, 367 U.S. 568, 603 (1961); *Blackburn* v. *Alabama*, 361 U.S. 199, 205 n.5, 208 (1960); *Crooker* v. *California*, 357 U.S. 433, 435 (1958); *Payne* v. *Arkansas*, 356 U.S. 560, 562, 567 (1958); *Thomas* v. *Arizona*, 356 U.S. 390, 393 (1958); *Fikes* v. *Alabama*, 352 U.S. 191, 196 (1957); *Stroble* v. *California*, 343 U.S. 181, 190 (1952); *Gallegos* v. *Nebraska*, 342 U.S. 55, 61 (1951); *Harris* v. *South Carolina*, 338 U.S. 68, 69 (1949); *Watts* v. *Indiana*, 338 U.S. 49, 50 (1949); *Turner* v. *Pennsylvania*, 338 U.S. 62, 63 (1949); *Haley* v. *Ohio*, 332 U.S. 596, 597-98 (1948); *Malinski* v. *New York*, 324 U.S. 401, 404 (1945); *Lyons* v. *Oklahoma*, 322 U.S. 596, 602 (1944); *Ashcraft* v. *Tennessee*, 322 U.S. 143, 152 (1944); *Ward* v. *Texas*, 316 U.S. 547, 552 (1942); *Lisenba* v. *California*, 314 U.S. 219, 238 (1941); *Chambers* v. *Florida*, 309 U.S. 227, 238 (1940).

[3] *Mincey* v. *Arizona*, 437 U.S. 385, 398 (1978); *Spano* v. *New York*, 360 U.S. 315, 316 (1959); *Ashdown* v. *Utah*, 357 U.S. 426, 427 (1954).

"fair consideration to the issues and the offered evidence," *id.* at 463 (opinion of Reed, J.), and where state fact-finding contained a "vital flaw." 344 U.S. at 506 (opinion of Frankfurter, J.). In addition, conclusions of mixed law and fact were never binding:

> Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts . . . the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.

Id. at 507 (opinion of Frankfurter, J.) (citations omitted).

Townsend v. *Sain*, 372 U.S. 293, 309-19 (1963), provided more detailed standards for determining when federal judges sitting in *habeas* can or must readjudicate issues of fact already decided by the state courts. However, even these limited restrictions on federal judges' power applied only to purely factual questions:

> By "issues of fact" we mean to refer to what are termed basic, primary, or historical facts: facts "in the sense of a recital of external events and the credibility of their narrators * * *." Brown v. Allen, 344 U.S. 443, 506, 73 S.Ct. 397, 446, 97 L.Ed. 469 (opinion of Mr. Justice Frankfurter). So called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense.

Id. at 309 n.6. Congress codified the *Townsend* standards, with some changes, in 1966, but the statute applied exclusively to questions of pure fact:

> In any proceeding instituted in a Federal Court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, *a determination after a hearing on the merits of a factual issue*, made by a State Court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and

adequate written indicia, *shall be presumed to be correct* . . .

28 U.S.C. § 2254(d) (emphasis added). After the 1966 amendments, and sometimes even before, this Court took for granted the federal courts' power in *habeas* cases to make their own determinations of the historical facts. *Procunier* v. *Atchley*, 400 U.S. 446, 451-52 (1971); *Frazier* v. *Cupp*, 394 U.S. 731, 739 (1969) ("our reading of the record does not lead us to a contrary conclusion"); *Boulden* v. *Holman*, 394 U.S. 478, 480 (1969) (District Court held full evidentiary hearing); *Cicenia* v. *LaGay*, 387 U.S. 504, 508 (1958) ("independent examination" of the record). Even in the earlier *habeas* cases where the Court addressed only the undisputed facts, it always treated the ultimate question of voluntariness as one subject to its plenary review. *Davis* v. *North Carolina*, 384 U.S. 737, 741 (1966); *Reck* v. *Pate*, 367 U.S. 433, 435, 440 (1961); *Leyra* v. *Denno*, 347 U.S. 556, 558 (1954).

The federal courts' position as guardians of constitutional rights requires the broad power of review developed since 1936 in voluntariness cases:

> No more restricted scope of review would suffice adequately to protect federal constitutional rights. For the mental state of involuntariness upon which the due process question turns can never be affirmatively established other than circumstantially—that is, by inference; and it cannot be competent to the trier of fact to preclude our review simply by declining to draw inferences which the historical facts compel.

Culombe, 367 U.S. at 605; *accord*, *Watts* v. *Indiana*, 338 U.S. at 51-52. As the Court has held repeatedly, the finding of a state court or jury cannot "foreclose" its federal duty of independent determination of a constitutional question. *Payne* v. *Arkansas*, 356 U.S. at 562; *Ashcraft* v. *Tennessee*, 322 U.S. at 148; *Ward* v. *Texas*, 316 U.S. at 550; *Chambers* v. *Florida*, 309 U.S. at 228-29. The potentially abusive surroundings of most interrogations, in private, beyond the immediate scrutiny of the courts or the public, make dishonesty particularly likely and

broad federal review particularly necessary. *See Clewis* v. *Texas*, 386 U.S. at 708 (noting frequency of factual conflicts in coerced confession cases); *Davis* v. *North Carolina*, 384 U.S. at 741 (testimonal conflict "almost invariabl[e]"); *Ashcraft* v. *Tennessee*, 322 U.S. at 152 (factual disputes "inevitable" after secret inquisitions).

For these reasons, this Court's deference to state courts in confession cases has always been limited even on purely factual questions. On the ultimate mixed question of voluntariness, it has never deferred to the States. In addition to the cases discussed above, seventeen cases implicitly treat voluntariness as a legal question subject to plenary review.[4] In fifty-two cases since 1936—for almost fifty years—this Court has treated voluntariness as a pure or mixed question of law. No case has ever treated the issue as a question of fact.

B. The Congressional Intent Expressed In The Statute Governing *Habeas Corpus* Requires Deference To State Findings Of Fact But Not To Conclusions Of Law.

The role of state court fact-finding in confession cases parallels its role in cases applying the presumption of correctness of 28 U.S.C. § 2254(d) to other areas of law. *Strickland* v. *Washington*, ___ U.S. ___, 104 S.Ct. 2052, 2070 (1984), recently made clear that the presumption does not apply to mixed questions of law and fact. This Court has applied it only to historical facts involving the fact-finder's superior ability to assess credibility and demeanor.

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[4] *Hutto* v. *Ross*, 429 U.S. 28 (1976); *Lego* v. *Twomey*, 404 U.S. 477 (1972); *Darwin* v. *Connecticut*, 391 U.S. 346 (1968); *Sims* v. *Georgia*, 385 U.S. 538 (1967); *Boles* v. *Stevenson*, 379 U.S. 43 (1964); *Jackson* v. *Denno*, 378 U.S. 368 (1964); *Lynumn* v. *Illinois*, 372 U.S. 528 (1963); *Gallegos* v. *Colorado*, 370 U.S. 49 (1962); *Rogers* v. *Richmond*, 365 U.S. 534 (1961); *Stein* v. *New York*, 346 U.S. 156 (1953); *Johnson* v. *Pennsylvania*, 340 U.S. 381 (1950); *Lee* v. *Mississippi*, 332 U.S. 742 (1948); *Vernon* v. *Alabama*, 313 U.S. 547 (1941); *Lomax* v. *Texas*, 313 U.S. 544 (1941); *White* v. *Texas*, 310 U.S. 530 (1940); *Canty* v. *Alabama*, 309 U.S. 629 (1940); *Brown* v. *Mississippi*, 297 U.S. 278 (1936).

In the case most closely resembling petitioner Miller's, *Marshall* v. *Lonberger*, 459 U.S. 422, 425 (1983), the defendant faced two charges of aggravated murder, each including a "specification" that he had previously been convicted of an offense whose "gist" was the purposeful killing of or attempt to kill another. To support the specifications the State sought to prove a prior guilty plea to attempted murder, and defendant challenged the plea's voluntariness. *Id.* at 426. The Court of Appeals for the Sixth Circuit overturned the state court's determination that the plea was voluntary, holding that the determination was not "fairly supported by the records," 28 U.S.C. § 2254(d)(8), and that in any case "the question of an effective waiver of a federal constitutional right is governed by federal standards." *Id.* at 430, 431. This Court reversed because of the federal court's failure to defer properly to the state court's resolution of factual issues underlying the voluntariness determination. The Court did note, however:

> We entirely agree with the Court of Appeals for the Sixth Circuit that the governing standard as to whether a plea of guilty is voluntary for purposes of the Federal Constitution is a question of federal law . . . and not a question of fact subject to the requirements of 28 U.S.C. § 2254(d) . . . . But the questions of historical fact which have dogged this case from its inception—what the Illinois records show with respect to respondent's 1972 guilty plea, what other inferences regarding those historical facts the Court of Appeals for the Sixth Circuit could properly draw, and related questions—are obviously questions of "fact" governed by the provisions of § 2254(d).

Id. at 431-32. In particular, the Court of Appeals gave insufficient deference to the state court's conclusion that the defendant was lying when he testified that no one informed him of the attempted murder charge to which he purportedly pled guilty, either at the plea colloquy or at any other time. *Id.* at 435, 436. Because of the trial judge's ability to assess defendant's demeanor, and because of the presumption that defendant's attorneys had told him what the charges were, the state court's implicit conclusion that defendant was lying had fair record support and required deference by the Court of Appeals. *Id.* at 437, 438.

Another recent case applied the presumption to a photographic identification procedure in a way that made clear that deference springs largely from the state court's on-the-spot advantages. In *Sumner* v. *Mata*, 449 U.S. 539 (1981) ("*Sumner* I"), the Court of Appeals for the Ninth Circuit had reversed a state court's assessment of the suggestiveness of a photographic array without explaining why it had not deferred to the State's factual conclusions. *Id.* at 548. This Court in turn reversed the Court of Appeals because of its failure to state why one of the exceptions to 28 U.S.C. § 2254(d) justified overriding the presumption of correctness. *Id.* at 551-52.

On remand, the Court of Appeals held that § 2254(d) did not apply because the question whether an identification procedure was impermissibly suggestive was a mixed question of law and fact. *Sumner* v. *Mata*, 455 U.S. 591, 596 (1982) ("*Sumner* II"). Again the Court reversed:

> We agree with the Court of Appeals that the ultimate question as to the constitutionality of the pretrial identification procedures used in this case is a mixed question of law and fact that is not governed by § 2254(d). In deciding this question, the federal court may give different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard. But the questions of fact that underlie this ultimate conclusion *are* governed by the statutory presumption as our earlier opinion made clear.

Id. at 597 (emphasis in original). Thus the five factors enumerated in *Neil* v. *Biggers*, 409 U.S. 188, 199-200 (1972), for assessing the likelihood of misidentification, were factual questions subject to the presumption. *Sumner* II, 455 U.S. at 597 n.10. These factors, like the credibility question in *Marshall*, 459 U.S. 422, involve determinations better made by the trial judge, with live witnesses before him, than by federal judges further removed from the case.[5]

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[5] Although *Sumner* itself involved fact-finding by a state appellate court, ordinarily a trial judge will apply the *Neil* v. *Biggers* factors after hearing witnesses testify about the circumstances surrounding the out-of-court identification procedure. *Sumner I*, 449 U.S. at 545-46.

This Court has drawn similar distinctions in other recent cases applying the presumption. *Maggio* v. *Fulford*, ___ U.S. ___, 103 S.Ct. 2261, 2262 (1983), established that the presumption applied to a state court's conclusion that defendant was not entitled to a competency hearing. The judge had based his decision on observation of defendant's courtroom behavior and on his belief that a defense psychiatrist's brief evaluation could not override his own opinion that defendant was simply trying to delay his trial. *Id.* at 2262-63. This Court affirmed because the trial judge had been face to face with the living witnesses. *Id.* at 2264, *quoting United States* v. *Oregon Medical Society*, 343 U.S. 326, 339 (1952). In the same vein, because the trial judge could himself evaluate a juror's demeanor, this Court held in *Rushen* v. *Spain*, ___ U.S. ___, 104 S.Ct. 453, 456 (1983), that the substance of *ex parte* communications between judge and juror, and their effect on juror impartiality, were questions of historical fact entitled to the presumption. Finally, *Patton* v. *Yount*, ___ U.S. ___, 104 S.Ct. 2885, 2891 (1984), established that the presumption applied to the factual question whether pretrial publicity had destroyed an individual juror's impartiality.[6] *Accord*, *Wainwright* v. *Witt*, ___ U.S. ___, 53 U.S.L.W. 4108 (Jan. 21, 1985) (presumption applies to trial court's determination that prospective capital juror was properly excluded for conscientious opposition to the death penalty); *Smith* v. *Phillips*, 455 U.S. 209, 218 (1982) (presumption applies to trial judge's finding that juror's job application to prosecutor's office did not affect impartiality); *cf. Wainwright* v. *Goode*, ___ U.S. ___, 104 S.Ct. 378, 382-83 (1983) (presumption applies to State Supreme Court's determination that trial judge, sitting as trier of fact, did not rely on non-statutory aggravating factor in imposing death penalty).

In contrast, where the relevant inquiry interweaves legal questions with factual ones, this Court has held that the presumption does not apply. *Strickland* v. *Washington*, 104 S.Ct. at 2070 (ineffectiveness of counsel is a mixed question of law and fact); *Cuyler* v. *Sullivan*, 446 U.S. 335, 342 (1980) (although findings about attorneys' roles are factual, determination that they did not engage in improper multiple representation is a mixed question not subject to presumption of correctness). Finally, the federal court is always free to make additional findings to those made in state court. *Brewer* v. *Williams*, 430 U.S. 387, 397 (1977); *cf. Blackledge* v. *Allison*, 431 U.S. 63 (1977) (no deference to trial court's conclusion plea was voluntary because it did not consider off-the-record occurrences).

[6] The Court did not decide whether the question whether the jury as a whole was impartial was a purely factual question or a mixed question of law fact. *Id.* at 104 S.Ct. at 2889 n.7, *citing Irvin* v. *Dowd*, 366 U.S. 717, 723 (1961).

This Court's distinction between factual and legal questions vindicates the Congressional intent expressed in 28 U.S.C. § 2254. Subsection (a) provides federal court jurisdiction over the question whether a state prisoner is in custody "in violation of the Constitution or laws or treaties of the United States." Subsection (d) specifically applies its presumption of correctness to a state court finding on a "factual issue." The statute's plain language thus clearly indicates that Congress intended to make the federal courts the final arbiters of constitutional questions raised by writ of *habeas corpus*.

For several reasons, Congress has decided that the federal courts are best suited to that role. First, they can provide the uniform constitutional standards implicit in the Constitution's function as the "supreme law of the land." U.S. Const. Art. III, par. 1; VI; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816); Reynolds, *Sumner* v. *Mata: Twilight's Last Gleaming for Federal Habeas Corpus Review Of State Court Convictions? Speculations on the Future of the Great Writ*, 4 U. Ark. Little Rock L.J. 289, 300 (1981); Note, *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1120 (1970). Second, as superior tribunals in a hierarchical judicial system, the federal courts have an advantage in deciding legal questions and a disadvantage in deciding factual ones. A more authoritative tribunal necessarily gives a more "correct" pronouncement of law. However, since the standard of correctness for a factual issue is what actually happened, lower courts can

more easily make correct findings since they make them closer in time to the events in question. Wright and Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 Yale L.J. 895, 920 n.67 (1966). Construing voluntariness as a question of fact would remove a constitutional question from the jurisdiction of the courts to which Congress entrusted it.

In addition, the long practice of plenary review of voluntariness questions parallels this Court's treatment of constitutional questions in contexts other than habeas corpus. For example, in *Bose Corp.* v. *Consumers Union of U.S., Inc.*, ___ U.S. ___, 104 S.Ct. 1949 (1984), a First Amendment case, the petitioner contended that Federal Rule of Civil Procedure 52(a) required the Court of Appeals to defer to a Federal District Court finding of actual malice unless clearly erroneous. This Court held that the "clearly erroneous" standard did not apply because actual malice was a question of constitutional law. *Id.* at 1967. Several characteristics of the "actual malice" rule distinguished it from a question of fact: (1) the rule's common law heritage gave the judge a broad role in applying it to specific factual situations; (2) although the rule springs from the Constitution, it is largely judge-made; and (3) "the Constitutional values protected by the rule make it imperative that judges—and in some cases judges of this Court—make sure that it is correctly applied." *Id.* at 1960. These factors equally characterize a determination of voluntariness and equally require its review as a question of constitutional law.

C. The Court Of Appeals' Reasons For Treating Voluntariness As A Question Subject To Deference Do Not Withstand Analysis.

Despite the overwhelming precedent for treating voluntariness as a mixed question, subject to plenary review, the majority in petitioner Miller's case treated it as a question requiring deference to a State Court determination on the authority of *Patterson* v. *Cuyler*, 729 F.2d 925 (3d Cir. 1984). In that case a *habeas* petitioner argued that he was entitled to a

hearing on the voluntariness of his waiver of rights pursuant to *Miranda* v. *Arizona*, 384 U.S. 436 (1966). *Id.* at 930. A panel of the Court of Appeals for the Third Circuit observed that two decisions of that court, *United States ex. rel. Hayward* v. *Johnson*, 508 F.2d 322, 325-26 (3d Cir.), *cert. denied*, 422 U.S. 1011 (1975), and *United States ex. rel. Rush* v. *Ziegele*, 474 F.2d 1356, 1358-59 (3d Cir. 1973), had held that the voluntariness of a confession was a mixed question not subject to the presumption of correctness in 28 U.S.C. § 2254(d). *Patterson*, 729 F.2d at 930. However, recent decisions of this Court led the Court of Appeals to believe that its own decisions no longer governed the related question whether a defendant has voluntarily waived his *Miranda* rights.

The court reviewed *Maggio* v. *Fulford*, 103 S.Ct. 2261, *Marshall* v. *Lonberger*, 459 U.S. 422, and *Rushen* v. *Spain*, 104 S.Ct. 453, and found that each held that even mixed questions were subject to the presumption. *Patterson*, 729 F.2d at 931-32. It then without explanation used the unremarkable proposition that federal courts sitting in *habeas* may not ordinarily re-evaluate witnesses' credibility as the basis for the remarkable conclusion that the presumption applies to the voluntariness issue. *Id.* at 932. Finally, the court apparently contradicted itself by characterizing voluntariness as a question of pure historical fact. *Id.*

The Court of Appeals misread the opinions on which it relied. None of these cases held mixed questions subject to the presumption; indeed, each explicitly applied it to questions of fact. *Rushen*, 104 S.Ct. at 456 ("The substance of the *ex parte* communications and their effect on juror impartiality are questions of historical fact entitled to this presumption."); *Maggio*, 103 S.Ct. at 2264 (trial judge's "conclusion as to Fulford's competency" was treated by this Court as a "factual conclusion" since neither party ever claimed that an issue of law was involved[7]); *Marshall*, 459 U.S. at 431, 432 (questions of histor-

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[7] Examination of the *certiorari* pleadings and the petition for rehearing in *Maggio* reveal that the respondent simply assumed that the question of competency was a factual issue unsupported by the record under § 2254(d).

ical fact "which have dogged this case from its inception" entitled to deference). If any of these opinions had extended the presumption to mixed questions, it would have cut short the life of the very recent leading case, *Sumner* II, 102 S.Ct. at 1306-07, which found that § 2254(d) does not govern mixed questions and stated that "the federal court may give different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard." *Marshall* and the other cases addressed a state court's factual inferences from other facts, not legal inferences:

> But the questions of historical fact which have dogged this case from its inception—what the Illinois records show with respect to respondent's 1972 guilty plea, *what other inferences regarding those historical facts* the Court of Appeals for the Sixth Circuit could properly draw, and related questions—are obviously questions of "fact" governed by the provisions of § 2254(d).

Marshall, 459 U.S. at 431-432 (emphasis added). This Court has never held either that the ultimate issue of voluntariness is subject to the presumption or that it is a purely factual question. Its recent decisions construing § 2254(d) have focused on genuinely historical questions involving evaluation of credibility and demeanor. *See* pp. 18 to 20, *supra*. The Third Circuit's leap in *Patterson* from the need for deference on credibility questions to the status of "fact" for voluntariness questions has support in neither logic nor this Court's opinions.

The majority in petitioner Miller's case nevertheless followed *Patterson's* lead by holding that § 2254(d) governs the voluntariness of a confession as well as the voluntariness of a *Miranda* waiver. Although *Patterson* had been ambiguous about whether voluntariness was a mixed or pure factual question, the majority read *Patterson* as holding that it was a mixed question of law and fact subject to the presumption. *Miller* v. *Fenton*, 741 F.2d 1456, 1462 (1984). Turning to the recent decisions of this Court construing § 2254(d), including *Patton* v. *Yount*, 104 S.Ct. 2885, the majority perceived a trend of withdrawing plenary review over "state of mind" determinations.

Id. at 1462 & n.11. It also pointed to language in *Culombe* v. *Connecticut*, 367 U.S. 568, 605 (1961), which indicated that what the Court considered the mixed question of state of mind nevertheless required some deference to the state court's determination. *Miller*, 741 F.2d at 1463. Next it analogized to *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287-88 (1982), which held that, on direct appellate review, "ultimate" findings of fact, which are dispositive of the legal issues, are entitled to deference unless "clearly erroneous." *Miller*, 741 F.2d at 1464. The majority reasoned that this Court was increasingly limiting the scope of review of factual questions because *Miranda* v. *Arizona*, 384 U.S. 436 (1966), had so curbed police misconduct that the Court's earlier vigilant supervision of interrogations had become unnecessary. *Miller*, 741 F.2d at 1464-65. Therefore, the Court was beginning to defer to the states even on legal questions if they were interwined with factual ones. *Id.* at 1465.

Like the *Patterson* opinion, the majority opinion's reduction of *Patton* and its predecessors to "state of mind" cases ignored the substantial credibility and demeanor problems which led this Court to require deference to state court determinations. State of mind questions often involve inferences mixed with legal principles rather than credibility assessment. In addition, the majority distorted the constitutional standard for voluntariness, the totality of the circumstances, which embraces both subjective and prescriptive elements. See pp. 10 to 12 *supra*. Determining voluntariness involves assessing police practices as well as evaluating defendant's inferred state of mind and thus is only partly a fact-bound endeavor. *Pullman-Standard*, 456 U.S. 273, therefore provides no support for the majority's decision, for that opinion repeatedly and explicitly states that it governs only pure, historical fact questions. *Id.* at 1788-90 & nn.16 & 19. Finally, the majority was certainly too sanguine about the perceived nation-wide reform of interrogation practices and the resulting decrease in the need for federal enforcement of constitutional standards. As petitioner argues in Point II *infra*, the implied promises and

deception in this case seriously violated his right to due process of law. *See also Mincey* v. *Arizona*, 437 U.S. 385 (1978) (officer interrogated defendant for several hours although he had been placed under intensive care, could not speak, drifted in and out of consciousness, and repeatedly asked for an end to questioning). This Court has never indicated any intent to abdicate its duty to ensure that police obtain confessions without violating defendants' constitutional rights. *See Cardwell* v. *Taylor*, ___ U.S. ___, 103 S.Ct. 2015, 2016 (1983); *Mincey*, 437 U.S. at 410 (Rehnquist, J., dissenting).[8]

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[8] The diversity of holdings of other Courts of Appeals on this issue reflects some of the same confusion as do the *Patterson* and *Miller* opinions. The law in most circuits explicitly or implicitly holds that voluntariness is subject to plenary review by the federal courts. *See Fowler* v. *Jago*, 683 F.2d 983, 992 (6th Cir. 1982); *Brantley* v. *McKaskle*, 722 F.2d 187, 188-89 (5th Cir. 1984); *Cf. Sullivan* v. *Alabama*, 666 F.2d 478, 482 (11th Cir. 1982) (federal court in habeas may substitute its "independent judgment" on voluntariness); *Nelson* v. *Callahan*, 724 F.2d 397, 401 (1st Cir. 1983) (deference to state fact findings and "factual inferences"); *Johnson* v. *Hall*, 605 F.2d 577, 580 (1st Cir. 1979) (where facts are undisputed, federal court free to make "independent" determination of voluntariness, a "legal" conclusion); *Lyle* v. *Wyrick*, 565 F.2d 529, 531 (8th Cir. 1977) (defendant claimed his interrogators had implicitly promised him psychiatric help instead of prosecution if he would make a statement. The court, applying *LaVallee* v. *Delle Rose*, 410 U.S. 690 (1973), assumed that trial judge had held the confession voluntary because he discredited the defendant's version, not because his testimony if true failed to establish the confession's voluntariness. On that assumption, the state court's findings should be presumed correct. *Id.* at 532); *Jones* v. *Cardwell*, 686 F.2d 754, 757 (9th Cir. 1982); *United States* v. *Tingle*, 658 F.2d 1332, 1335 (9th Cir. 1981); *Holleman* v. *Duckworth*, 700 F.2d 391, 396 (7th Cir.), *cert. denied*, ___ U.S. ___, 104 S.Ct. 116 (1983); *United States* v. *Robinson*, 698 F.2d 448, 455 (D.C. Cir. 1983); *United States ex. rel. Graham* v. *Franzen*, 675 F.2d 932, 938 (7th Cir. 1982).

The Court of Appeals for the Third Circuit in this case joins only the Second and Fourth in deciding that voluntariness is a question subject to the presumption of correctness. *See Alexander* v. *Smith*, 582 F.2d 212, 217 (2d Cir. 1978); *Miller* v. *Maryland*, 577 F.2d 1158, 1159 (4th Cir. 1978).

The Court of Appeals decision in this case distorted the constitutionally required standard of voluntariness and abandoned a half century's practice of independent review of coerced confession claims. If affirmed, the decision will mean that federal courts will be able to remedy the extraction of illegal confessions only in exceptional circumstances. 28 U.S.C. § 2254(d)(1)-(8). It will transform them from the watchdogs of due process into spectators in the constitutional struggle. To prevent such a result this Court should reverse the decision of the Court of Appeals.

II.

PETITIONER'S CONFESSION WAS INVOLUNTARILY OBTAINED BY POLICE PRACTICES WHICH OPERATED TO OVERBEAR HIS WILL.

Historically, the judiciary has scrutinized methods used by police to obtain confessions. This Court has consistently and strenuously condemned the use of confessions extracted from a suspect by coercion. In response to these decisions, the police have substantially modified their interrogation procedures to eliminate the brutal and blatant "third degree" tactics which once were commonplace. It would be extremely ironic if by adopting more subtle, but equally effective, means of coercion, such as those which the United States Court of Appeals for the Third Circuit approved below, law enforcement personnel were allowed to circumvent the mandates of this Court.

Careful examination of the transcript of petitioner's confession as well as listening to the actual recording,[9] leaves no doubt that petitioner's confession was, in the words of New Jersey's Appellate Division, a result of "tremendous psycholog-

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[9] Because of the availability of the actual tape recording of the interrogation, this Court has the unique opportunity to listen to the tape and hear the subtle coercive power employed by the interrogator which the written transcript can only begin to convey. Only by listening to the tape recording can one truly gain a sense of how petitioner's will was overborne.

ical pressure," an "intense and mind-bending psychological compulsion," and a "will-abrading grind" interrupted with "relentless and successful Svengalian efforts" (JA 45, 49, 53); pressure so strong as to culminate in petitioner's complete physical and psychological collapse. By employing tactics which included lies regarding incriminating evidence, misrepresentations as to the true role of the interrogating officer, express promises of psychiatric help, implied promises of legal exculpation, and continuous pressure to confess, the police obtained a statement which was clearly not the result of free and unconstrained will. *See Schneckloth* v. *Bustamonte*, 412 U.S. at 225-226. The Court of Appeals for the Third Circuit erred in its findings to the contrary.[10]

It is settled that a confession is competent evidence, in a constitutional sense, only when it has been voluntarily obtained, *Brown* v. *Mississippi*, 297 U.S. 278 (1936); *Miranda* v. *Arizona*, 384 U.S. 436, 461-462 (1966). The earliest cases involving coerced confessions, focusing no doubt on the shocking factual circumstances present, recognized the danger that such confessions were inherently unreliable because of the likelihood that the defendant acquiesced rather than endure further pain. *See Brown* v. *Mississippi; Ward* v. *Texas*, 316 U.S. 547 (1942). With time, the focus expanded to meet the concern that police practices utilized to obtain confessions should not impose an intolerable degree of pressure on the will

[10] Should this Court affirm the majority opinion in the Third Circuit Court of Appeals and hold that the voluntariness question is a finding of fact subject to the presumption of correctness set forth in 28 U.S.C. § 2254(d), petitioner would still submit that such factual determination made by the state court is not fairly supported by the record. 28 U.S.C. § 2254(d)(8). It is further noted that while the majority opinion below deferred to the findings of the state courts, it indicated in *dicta* that "[e]ven if our review of this question was plenary, we would reach the same result. We essentially agree with the conclusions of the New Jersey Supreme Court concerning the effect of Boyce's questioning of Miller." 741 F.2d at 1467, n.21. (JA 130)

of the suspect. Thus, the ultimate question is whether, under the totality of the circumstances, a defendant's will was overborne and his capacity for self-determination seriously impaired. *Culombe* v. *Connecticut*, 367 U.S. at 602.[11] This Court has stated that "[T]he Fourteenth Amendment forbids 'fundamental unfairness in the use of evidence whether true or false,'" *Blackburn* v. *Alabama*, 361 U.S. at 206, and the policy underlying the constitutional doctrine has been articulately stated as follows:

> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict thos thought to be criminals as from the actual criminals themselves.

Spano v. *New York*, 360 U.S. at 320-321. Thus, the admission into evidence of an involuntary confession will be condemned as a factor corrupting or perverting a judgment, irrespective of the amount of independent evidence present. *Payne* v. *Arkansas*, 356 *U.S.* at 567-568. As was stated in Point I, *supra*, it is incumbent upon a court in reaching a determination as to the voluntariness of a confession to weigh both the characteristics of the particular individual and the nature of the pressure brought to bear upon him, recognizing that coercion which vitiates a confession can be subtle as well as blunt, psychologi-

[11] As we indicated in Point One, *supra*, among the "totality" of factors considered are the defendant's age, education, and intelligence; whether his interrogators informed him of his constitutional rights; the length of detention; whether and how long the detention was incommunicado; the duration of questioning; the number of interrogators and atmosphere of questioning; and the use of physical abuse or deprivation of food, sleep, or medicine. *Schneckloth* v. *Bustamonte*, 412 U.S. at 266; *Haley* v. *Ohio*, 332 U.S. at 598; *Lyons* v. *Oklahoma*, 322 U.S. 596, 604 (1944); *Chambers* v. *Florida*, 309 U.S. at 238. This Court has also considered whether a confession was extracted through threats or promises. *Hutto* v. *Ross*, 429 U.S. at 30.

cal as well as physical. *Garrity* v. *New Jersey*, 358 U.S. at 496; *Townsend* v. *Sain*, 372 U.S. at 307. As Chief Justice Warren noted in *Blackburn* v. *Alabama*, 361 U.S. at 206, "the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated means of 'persuasion.'"

The tape of the confession reveals that from the outset of the interrogation the interrogating detective lied to petitioner about the victim's condition, the alleged evidence implicating him in the murder and about being identified by the victim's brothers. During the *voir dire* testimony before the trial judge, petitioner testified that before the confession was taped one of the detectives informed him that the victim was alive and able to identify her assailant. (T 109-1 to 4) Petitioner's statement was corroborated during the following exchange between Detective Boyce ("B") and petitioner ("M"):

M. Let me ask you a question.

B. Sure.

M. You say this girl's dead, right?

B. She died just a few minutes ago. I just got—that's what this call was about.

M. Cause Officer Scott said she was in the hospital and I said well then let's go, you know, go right over there.

B. She was in the hospital . . .

M. And, uh . . .

B. . . . the call that Detective Doyle got, that's that's what that call was. (JA 16)

At trial, Detective Boyce admitted that this statement was untrue and that he had been aware that the victim was dead since seven o'clock in the evening. (T 305-5 to 5) Boyce also told petitioner that he had been seen at the victim's home prior to the murder:

B. But you were identified as being there talking to her minutes before she was . . . probably this thing happened to her. How can you explain that?

M. I can't. (JA 17)

Petitioner was also told that blood stains had been found on the stoop of his house. (JA 12) Despite the long and methodical presentation of the evidence by the prosecutor during trial, no evidence whatsoever as to these alleged crucial facts was presented at trial. Indeed, neither of the victim's brothers, nor anyone else, could identify the petitioner. Clearly, the detective's statements were untrue and intended to deceive the petitioner as to his true legal position as well as to trick him into confessing. That petitioner believed the detective's representations about the victim being alive is evident from the very first words of his confession: "I thought she was dead or I'd never have dropped her off [the bridge] like that." (JA 29)

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Fifth Amendment privilege against self-incrimination served as the ground for one seminal rule: law enforcement authorities may not keep a defendant ignorant of his true legal rights. Moreover, "[a]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive the privilege" against self-incrimination. *Id.* at 476.

Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against police practices, without regard to objective proof of the underlying intent of the police. *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980). The concern of this Court in *Miranda* was that the interrogation environment created by the interplay of interrogation and custody would "subject the individual to the will of his examiner" and thereby undermine the privilege against compulsory self-incrimination. *Miranda* v. *Arizona*, 384 U.S. at 457-458.

The point of telling a suspect that anything he says can be used against him is to sharpen the suspect's awareness of his position. As the *Miranda* majority stated: "[T]his warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest." 384 U.S. at 469. At least some degree of distortion of the *Miranda* warnings occurs whenever the police make a misstatement that relates to the legal effect of the suspect's exercise of his right to remain silent. *See* White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L.Rev. 581, 617 (1979).

A careful review of petitioner's taped confession reveals that the police, while applying an unconscionable level of psychological duress, used their lies, promises, trickery and deception to negate any effects of the protections the *Miranda* warnings were supposed to provide. It is both fascinating and highly disturbing to see how the combination of promises, deceptive claims and persistent cajoling was ultimately able to overbear the will of the petitioner who initially resisted the detective's onslaught, denying any involvement in the offense. (See JA 16, 17, 21, 26).

The initial lies of the interrogator were followed by approximately 45 more minutes of intensive, relentless questioning during which the detective barraged petitioner with express promises of help and implied promises of no criminal culpability if he would confess. Detective Boyce also engaged in the ploy of deceptively minimizing petitioner's culpability, a common interrogative technique which increases the likelihood of a confession. *Miranda* v. *Arizona*, 384 U.S. at 450-451. *See* Driver, *Confessions and the Social Psychology of Coercion*, 82 Harv. L.Rev. 42, 50 (1968). On no less than 41 occasions the detective urged the petitioner that he needed help to solve his problem and strongly implied that he would provide the help if petitioner would confess. On at least 12 occasions the detective emphasized that petitioner would not be held responsible for his actions and thus could not be held accountable for the murder; that the incident was not petitioner's fault and that

petitioner was not in need of punishment. The detective also misrepresented the role of the police by stating that their "job" was to get help for petitioner. (JA 26) The following exchanges (with emphasis added) are demonstrative of the foregoing:

> B. Frank, I don't think you're a criminal . . . I don't think you have a criminal mind. As a matter of fact, I know you don't have a criminal mind . . . (JA 14)
>
> * * *
>
> B. . . . who is ever, whoever is responsible for this act . . .
>
> M. Yeah.
>
> B. *He's not a criminal*. Does not have a criminal mind. I think they have a problem.
>
> M. Uh, huh.
>
> B. Do you agree with me?
>
> M. Yeah.
>
> B. They have a problem.
>
> M. Right.
>
> B. A problem, and a good thing about that Frank, is a problem can be rectified.
>
> M. Yeah.
>
> B. I want to help you, I mean I really want to help you, but you know what they say, God helps those who help themselves, Frank.
>
> M. Right.
>
> * * *
>
> B. . . . let's forget this incident, let's talk about your problem. This is what, this is what I'm concerned with, Frank, your problem.
>
> M. Right.
>
> B. If I had a problem like your problem. I would want you to help me with my problem.
>
> M. Uh, huh.
>
> B. Now, you know what I'm talking about.

M. Yeah.

B. And I know, and I think that, uh, a lot of other people know. You know what I'm talking about. *I don't think you're a criminal*, Frank.

M. No, but you're trying to make me one. (JA 15 to 16)

* * *

B. Frank, look, you want, you want help, don't you Frank?

M. Yes, uh huh, yes, but yet I'm, I'm not going to admit to something that, that I wasn't involved in.

B. We don't want you to, all I want you to do is talk to me, that's all. I'm not talking about admitting to anything, Frank. I want you to talk to me. I want you to tell me what you think, about this, what you think about this?

M. What I think about it?

B. Yeah.

M. I think whoever did it really needs help.

B. And that's what I think and that's what I know. *They don't, they don't need punishment, right? Like you said, they need help.*

M. Right.

B. *They don't need punishment. They need help, good medical help.*

M. That's right.

B. . . . to rectify their problem. *Putting them in, in a prison isn't going to solve it, is it?*

M. No sir. I know, I was in there for three and a half years. (JA 17 to 18)

* * *

B. Now listen to me Frank. This hurts me more than it hurts you, because I love people.

M. It can't hurt you any more that it hurts me.

B. Okay, listen Frank, I want you . . .

M. I mean even being involved in something like this.

B. Okay, listen Frank. *If I promise to, you know, do all I can with the psychiatrist and everything and we get the proper help for you, will you talk to me about it?*

M. I can't talk to you about something I'm not . . .

B. Alright, listen Frank, alright, honest. I know, I know what's going on inside you. Frank. I want to help you, you know, between us right now. I know what's going on inside you. Frank, you've got to come forward and tell me that you want to help yourself. You've got to talk to me about it. This the only way we'll be able to work it out. I mean, you know, listen, *I want to help you, because you are in my mind, you are not responsible. You are not responsible, Frank.* Frank, what's the matter?

M. I felt bad.

B. Frank, listen to me, honest to God, I'm, I'm telling you, Frank (inaudible). I know, it's going to bother you, Frank, it's going to bother you. It's there, it's not going to go away, it's there. It's right in front of you, Frank. Am I right or wrong?

M. Yeah.

B. You can see it, Frank, you can feel it, you can feel it but you are not responsible. This is what I'm trying to tell you, but you've got to come forward and tell me. Don't, don't, don't let it eat you up, don't, fight it. You've got to rectify it, Frank. We've got to get together on this thing, or I, I mean really, *you need help, you need proper help and you know it, my God, you know, in God's name you, you, you know it. You are not a criminal, you are not a criminal.* (JA 21 to 22)

* * *

B. You killed this girl didn't you.

M. No, I didn't.

B. Honest, Frank? It's got to come out. You can't leave it in. It's hard for you, I realize that, how hard it is, how difficult it is, I realize that, but you've got to help yourself before anybody else can help you. *And we're going to see to it that you get the proper help. This is our job, Frank. This is our job.* This is what I want to do.

M. By sending me back down there.

B. Wait a second now, *don't talk about going back down there*. First thing we have to do is let it all come out. Don't fight it because it's worse, Frank, it's worse. *It's hurting me because I feel it. I feel it wanting to come out, but it's hurting me, Frank. You're my brother, I mean we're brothers. All men on this, all men on the face of this earth are brothers, Frank*, but you got to be completely honest with me.

M. I'm trying to be, but you don't want to believe me.

B. I want to believe you, Frank, but I want you to tell me the truth, Frank, and you know what I'm talking about and I know what you're talking about. You've got to tell me the truth. I can't help you without the truth.

M. I'm tel ng you the truth. Sure, that's her blood in the car becaus when I seen the way she was cut I wanted to help her, and then when she fell over I got scared to even be involved in something like this, being on parole and . . .

B. I realize this, Frank, *it may have been an accident. Isn't that possible, Frank*. Isn't that possible?

M. Sure, it's possible.

B. Well, this is what I'm trying to bring out, Frank. *It may be something that, that you did that you can't be held accountable for.* This is, I can help you, I can help you once you tell me the truth. (JA 26 to 27)

The foregoing shows express promises of psychiatric help, reassurances that the job of the police was to get help for petitioner and implied promises that petitioner would not be imprisoned if he confessed. The detective also hinted broadly that petitioner's situation would be helped by a confession.

At common law, a confession induced by a promise of benefit to the defendant was inadmissible in evidence. This is apparently still the law in England today. See Comment, *Developments in the Law—Confessions*, 79 Harv. L.Rev. 935, 1091 (1966), citing to *The King* v. *Warikshall*, 1 Leach C.L. 263, 264, 168 Eng. Rep. 234, 235 (K.B. 1783), and *Regina* v. *Moore*, 2 Den. C.C. 522, 169 Eng. Rep. 608 (Ct. Cr. App. 1852). In this country any discussion of the relevant legal principles governing the admissibility of confessions induced or elicited by promises should begin with this Court's opinion in *Bram* v. *United States*,[12] 168 U.S. 532 (1897), where Justice White noted:

> "But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. * * *
>
> A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted."

Id. at 542-543, quoting 3 Russ. Crimes (6th Ed.) 478. This Court has continued to cite the *Bram* rule with approval. A confession induced by a promise, however slight, whether direct or indirect, is inadmissible in evidence. *See Hutto* v. *Ross*, 429 U.S. at 31; *Brady* v. *United States*, 397 U.S. 742, 753 (1970); *Beecher* v. *Alabama*, 389 U.S. at 39; *Malloy* v. *Hogan*, 378 U.S. at 12.

In circumstances factually analogous to the instant case, this Court has held confessions induced by direct or implied prom-

---

[12] In *Bram*, the issue was decided on Fifth Amendment self-incrimination grounds. Until this Court incorporated the Fifth and Sixth Amendments into the Fourteenth, *Malloy* v. *Hogan*, 378 U.S. 1, 12 (1964); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), it could review confessions used in state proceedings only under the Fourteenth Amendment's due process clause. Once the privilege against compulsory self-incrimination was held applicable against the States in *Malloy* v. *Hogan*, it was recognized that the standard of voluntariness which had evolved in state cases under the due process clause of the Fourteenth Amendment was the same general standard which applied in federal prosecutions—a standard grounded in the policies of the privilege against self-incrimination:

> ". . . today the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897 . . .

378 U.S. at 7; *see also*, *Davis* v. *North Carolina*, 384 U.S. at 740.

ises to be involuntary. In *Leyra* v. *Denno*, 347 U.S. 556 (1953), as in the instant case, this Court had available a tape recording of the interview with the defendant during which the state psychiatrist induced a confession by promises of help. Except for the fact that Detective Boyce (the detective in the instant matter) is a highly skilled interrogator and not a psychiatrist, Justice Black, in finding the confession in *Leyra* involuntary, might have easily been describing the circumstances leading up to petitioner Miller's confession:

> For an hour and a half or more the techniques of a highly trained psychiatrist were used to break petitioner's will in order to get him to say he had murdered his parents. Time and time and time again the psychiatrist told petitioner how much he wanted to and could help him, how bad it would be for petitioner if he did not confess, and how much better he would feel, and how much lighter and easier it would be on him if he would just unbosom himself to the doctor. Yet the doctor was at that very time the paid representative of the state whose prosecuting officials were listening in on every threat made and every promise of leniency given.

Id. at 559-60.

In *Haynes* v. *Washington*, 373 U.S. at 513-515, this Court found a confession involuntary primarily because the defendant, being held incommunicado, was promised that he could call his wife if he confessed. It is noteworthy that defendant's prior contact with the police did not militate against his claim. What this Court recognized there is equally applicable to petitioner here who had prior arrests and convictions. This Court observed that, notwithstanding the defendant's "prior contacts with the authorities . . . he had no reason not to believe that the police had ample power to carry out their threats" and that he could call his wife only if he "cooperated". *Id.* at 514.

In *Lynumn* v. *Illinois*, 372 U.S. at 534, this Court held involuntary a confession elicited by police who promised leniency and assured defendant that her children would not be taken away from her if she agreed to confess. "In short, the true test of admissibility is that the confession is made freely,

voluntarily and without compulsion or inducement of any sort". *Id.*

In a case which is factually close to the instant one, *United States ex rel. Everett* v. *Murphy*, 329 F.2d 68 (2d Cir. 1964), the Second Circuit[13] found that a combination of deception and promises rendered the confession involuntary. There, as here, the police told the defendant that his victim was alive and could identify him, and that unless the defendant told the truth they would not help him.

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[13] Numerous state courts have found confessions induced by direct or implied promises to be involuntary: *People* v. *Quinn*, 61 Cal.2d 551, 39 Cal. Rptr. 343, 393 P.2d 705 (1964) (confession *per se* involuntary where a probation officer induced a defendant to confess by telling him that he would not recommend probation if defendant did not tell him the truth. The court held this to be an implied promise); *People* v. *Trout*, 54 Cal. 2d 576, 6 Cal Rptr. 753, 354 P.2d 231 (1960); *Commonwealth* v. *Eiland*, 450 Pa. 566, 301 A.2d 651 (1973) (holding involuntary a confession which immediately followed a police officer's statement to the defendant that in order to "make it light on himself" and quite possibly do "better than the others," defendant ought to tell the officer what he knew of the incident); *Miller* v. *State*, 243 So.2d 558 (Miss. 1971) (confession induced by sheriff's promise that accused would be better off if he told the truth held involuntary); *Miller* v. *State*, 250 So.2d 624 (Miss. 1971) (confession ruled involuntary where a sheriff led defendant to expect leniency or immunity if she confessed); *Shelton* v. *State*, 475 S.W.2d 538 (Ark. 1972) (holding confession to be *per se* involuntary where a prosecuting attorney promised to help the defendant all he could if he would confess); *State* v. *Ware*, 205 N.W. 2d 700 (Iowa 1973) (finding a confession involuntary where police officer told defendant prior to exacting a confession that "it would go easier if he wanted to tell us anything"); *State* v. *Chamberlain*, 263 N.C. 406, 139 S.E. 2d 620 (1965) (confession involuntary where deputy sheriff told the defendant that they would do their best to prevent an indictment on kidnapping if the defendant confessed to a charge of armed robbery). Some states have even ruled confessions inadmissible where the promise of benefit was made by a private citizen. *See Fisher* v. *State*, 379 S.W. 2d 900 (Tex. Crim. App. 1964); *State* v. *Stuart*, 206 Kan. 11, 476 P.2d 975 (1970).

Two cases from the highest courts of California and Montana are instructive. In *State* v. *Jiminez*, 147 Cal. Rptr. 172, 580 P.2d 672 (1978), as in the case *sub judice*, the defendant was convicted of first degree murder following two confessions (the second confession having been taped). During the course of interrogation, defendant was told that if he needed psychiatric help, it was available to him. He was also told that he had been positively identified and positively placed at the scene of the crime. Finally, the police stated to defendant that he could be subject to the death penalty, but that his juvenile co-defendant would not be. This statement was found to constitute an implied promise of leniency—the implication being that if defendant cooperated, he would not be sentenced to die. The court held that "the slightest pressure, whether by way of inducement to confess or threat if confession is withheld is sufficient to require exclusion", *Id.* at 678, and stated:

> If the defendant is given to understand that he might expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible. In any event, even if we were to assume that no express promises to the defendant had been made, our conclusion that defendant's first confession was involuntary would remain unchanged because we believe that the confession was the result of an *implied* promise of leniency.

Id. at 681.

In *State* v. *Allies*, 606 P.2d 1043 (Mont. 1979), the Supreme Court of Montana invalidated as involuntary a defendant's confession to having committed multiple murders. While the factors weighed by the court in invalidating Allies' confession are clearly distinguishable from the factors present in the case here under review—the pivotal issue presented in *Allies* was whether the results of a sodium amythal ("truth serum") test were admissible where the recipient was without benefit or advice of counsel and had not received a *Miranda* warning *immediately* preceding the administration of the serum—two

factors prominent in the instant case were considered significant by the court in *Allies:*

> Two variables weigh heavily in our consideration. The first, lying to defendant about how much is known about his involvement in the crimes,[14] is particularly repulsive to and totally incompatible with the concept of due process embedded in the federal and state constitutions. The effect is particularly coercive and in this case is not lessened by the time lag between the initial interrogation and the confession. The lie, although not repeated, was reinforced by Dr. Hughett, the "investigator-psychiatrist" who conversed with defendant approximately fifteen minutes before he confessed. He told defendant that his story was inconsistent, that nobody would believe him, that he would have to produce the real killer to clear himself, and that he could in fact be the killer.
>
> The second factor to which we give weight is the "subtle" psychological pressure which was exerted on Allies from the time he first talked with Bell and Trimarco (police detectives) until the time he confessed. The pressure of which we speak lies in leading defendant to believe his problem was "medical or psychiatric rather than criminal."

Id. at 1051.

The promises and inducements to confess in the instant case are evident in the taped confession. There are no issues of credibility. It is noteworthy that the trial judge had actually found that there was a promise of psychiatric help in return for petitioner's confession, but concluded that the promise was insufficient to render the confession inadmissible. (T146-22 to T147-3) The trial judge also placed emphasis on the fact that there was no *express* promise of non-prosecution by the detective, who was clearly skillful in avoiding such an express prom-

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[14] The two police officers conceded that they had lied to defendant about what they knew of his connection to the homicides. They told him he had been positively identified and placed at the scene of the crime. Both officers also told defendant that if he needed psychiatric help, it was available to him.

ise. (T146-10 to 19). However, as was previously stated, this Court has proscribed the extracting of confessions by threats, as well as the obtaining of confessions by any direct or *implied* promises. *Brady* v. *United States; Malloy* v. *Hogan*. Legitimization of the skillful techniques of the interrogating detective in this case rewards the interrogator who is clever or devious enough to avoid brutality.

Nor can the other significant circumstances surrounding petitioner's confession be ignored. Petitioner had a history of psychiatric problems of which the detective was well aware. Indeed, Detective Boyce went so far as to assure petitioner that it was the psychiatrist who was to blame for petitioner's acts in the eyes of the authorities:

B. What, what do you think compels somebody to do something like this. What do you think it is, Frank?
M. Well, it could be a number of things.

B. Give me an example.
M. It could be a person that, that drinks, uh, you know, a lot, and just, you know, don't know what they, what they did once they been drinking. It could be somebody with narcotics that, that don't know what they're, you know, what they're doing once they shot up or took some pills or whatever they do, I don't know, I'm not a drug addict and never intend to be.

B. What else, Frank? What other type of person would do something like this?
M. Somebody with a mental problem.

B. Right, Somebody with a . . .
M. Mental problem.

B. . . . serious mental problem, and you know what I'm interested in, I'm not, I'm interested in, in preventing this in the future.
M. Right.

B. Now, don't you think it's better if someone knows that he or she has a mental problem to come forward with it and say, look, I've, I've, I've done these acts, I'm responsible

for this, but I want to be helped. I couldn't help myself, I had no control of myself and if I'm examined properly you'll find out that's the case. Is that right or wrong?
M. Yeah, that, that they should be examined and, uh, you know, maybe a doctor could find out what's wrong with em.

B. Have you ever been examined.?
M. Yes.

B. And did you have a problem?

M. Well, when I come, uh, made parole, in, uh, September, the uh stipulation was, uh, that I see a psychiatrist.

B. Alright . .
M. Dr. Taylor over here at the Medical Center, I seen him two, maybe three times and last time I was there he gave me a test . . .

B. Uh, huh.
M. . . . uh, it was a bunch of bull shit, in plain English. If the big wheel turns one way, what way does the little wheel turn? So I took that test. He says, alright, he says, I say when do I come back, because this is part of my parole.

B. I see.
M. And he says, uh, I'll call you and let you know, he says I want to get this, work this test out first. He up to this date, the man has never called me, uh. . .

B. How do you feel about this?
M. Well, I think it's wrong.

B. Would you, do you, did you feel that after not finding out the results of that test that you might do something that you might not be responsible for?
M. No.

B. Did you feel that you were capable, maybe, of doing something because you didn't get the results of this, . . . because they didn't like, help you, did they?
M. No.

B. Well, then did you still feel this way that something might happen it would be their fault because, *as far as I'm*

concerned if something did happen. It's not your fault, it's their fault. . .
M. Right.

B. . . . because that was a part of your parole . . .
M. Right.

B. . . . and they didn't live up to it.
M. Right.

B. You agree with me?
M. Yeah, that . . .

B. *So, therefore, if you did commit an act, actually they're the ones that are to blame, in my eyes. . .*
M. Right.

B. . . . *not you as an individual.* You were there seeking help. You went there, they didn't, right, you went there voluntarily, right?
M. Right. (JA 18 to 20)

Certainly, petitioner's history of emotional instability and psychiatric problems must be taken into consideration in supporting a finding of involuntariness. *See Spano* v. *New York*, 360 U.S. at 322. Petitioner's lack of education is another factor to be considered. Although he endeavored to take equivalency courses in prison, petitioner completed only one year of high school. *See Clewis* v. *Texas*, 386 U.S. 707 (1967). Moreover, the interview took place during the early morning hours, beginning at 1:47 a.m. and concluding at 2:45 a.m. This was preceded by approximately one hour of interrogation at petitioner's place of employment and approximately two hours of interrogation at police headquarters. It is also clear that this confession was the product of "sympathy falsely aroused" by Detective Boyce, who assured petitioner that he was his "brother" and had his best interests at heart. *See Spano* v. *New York*, 360 U.S. 315. As the taped confession shows, Detective Boyce went far beyond simply urging petitioner to tell the truth.

Finally, the physical condition of a person confessing is an important factor in determining voluntariness. *Culombe* v. *Connecticut*, 367 U.S. at 602; *Blackburn* v. *Alabama*, 361 U.S.

at 208. Juxtaposing petitioner's emotional and psychological profile with the methods employed throughout the final interrogation, the devastating physical consequences are not surprising. A sense of petitioner's physical condition is obvious from remarks made during the course of the interrogation:

B. Are you, do you feel what I feel right now?
M. I feel pretty bad. (JA 16).

* * *

B. Frank you're very, very nervous. Now . . . you understand what I'm saying?
M. Yeah, I know what you're saying. (JA 20)

B. . . . Frank, what's the matter?
M. I feel bad. (JA 22)

As Judge Gibbons noted in the Third Circuit dissent, thirty minutes into the interrogation, petitioner was sobbing, "distraught, weak and unstable." (JA 133) Detective Boyce admitted at trial that petitioner was breathing heavily at times during the interview and that he was talking in a very low voice near the end. At the conclusion of the interrogation, petitioner went into a state of shock, slid off of his chair onto the floor, and was transported by ambulance to the hospital after efforts by the police to arouse him failed. (T84-3 to T85-14) Since petitioner collapsed after the confession, the police were unable to obtain a signed statement. It is submitted that if Frank Miller had not collapsed after his confession, a written statement would have been taken and the tape recording would most likely have never been heard. Consequently, this case provides us with a rare behind-the-scenes look at the inducements used to obtain confessions free of credibility issues.[15]

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[15] In two other cases, *Reilly* v. *State*, 32 Conn. Supp. 349, 355 A.2d 324 (Super. Ct. 1976), and *State* v. *Biron*, 266 Minn. 272, 123 N.W.2d 392 (1963), the interrogations used to elicit the confessions were actually recorded, thus providing further examples of interrogating officers' behavior in what are usually secret proceedings. In neither case was there evidence of threats or physical abuse of any kind. In

In light of the above and in light of the conduct the police exhibited here, this Court must reaffirm its commitment to the principle that evidence of a confession is inadmissible when it has been induced by tactics employing promises and deceit, and when such tactics operate under the totality of circumstances to overbear a defendant's will. This principle must apply both when the promise is explicitly or implicitly articulated, as long as the police suggestion is likely to induce a suspect to believe that his legal position—here, petitioner's relationship with the criminal justice system—will improve if he confesses or deteriorate if he remains silent. To legitimize or condone the techniques employed to obtain a confession in this case will encourage police who are clever in their attempt to circumvent the rules set down by this Court.

The issues in this case have been difficult to resolve from its inception, due to the complexities of the issues themselves, but also due, no doubt, to the horror of the crime itself. In this regard this Court must remain mindful of its admonition in *Davis* v. *North Carolina*, 384 U.S. at 1763, that we are not called upon to pass on the guilt or innocence of the petitioner. Nor are we called upon to determine whether the confession is

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State v. *Biron*, the Supreme Court of Minnesota found that the defendant was deprived of due process of law by the use at trial of a confession "induced by improper statements, promises and conduct of the police." 123 N.W.2d at 397. One of the officers interrogating Biron assumed the role of religious counsellor by speaking to him as a fellow Catholic and enlightening him about the values of confession. *See* White, *Police Trickery in Inducing Confessions*, *supra*, 127 U. Pa. L.Rev. at 615. When Biron ultimately confessed he was crying, shaking and sobbing; his "whole body was quivering." 123 N.W.2d at 397. In *Reilly* v. *State*, the chief investigating officer manipulated the situation so that the suspect (decedent's son) would view the officer as a father figure. White, *supra*, 127 U. Pa. L.Rev. at 615. Reilly, who eventually confessed to having killed his mother, ultimately had his case dismissed. The evidence that led to the ultimate dismissal of his case appears to have established that his confession was false. *Id.* at 616, n.183.

true or false. The sole issue presented for review is whether or not the confession was voluntarily given or whether it was the result of overbearing police practices. Experience has taught us that confessions extracted by coercive police procedures are highly unreliable; thus, it is only by eliminating overbearing police tactics that we can insure that justice is served. In accordance with these principles, it must be found that the confession was induced by a set of calculated circumstances designed for and successful in overcoming Mr. Miller's will, and as such its use at trial must be condemned.

CONCLUSION

For the foregoing reasons the judgment below should be reversed.

Respectfully submitted,

THOMAS S. SMITH
Acting Public Defender of New Jersey

/s/ BY: Paul M. Klein
PAUL M. KLEIN*
Assistant Deputy Public Defender

CLAUDIA VAN WYK
Assistant Deputy Public Defender

Office of the Public Defender
Appellate Section
20 Evergreen Place
East Orange, New Jersey 07018
201 - 266-1800

Counsel for Petitioner
**Counsel of Record*

RESPONDENT'S

BRIEF

No. 84-5786

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK M. MILLER, JR.,
Petitioner,

-vs-

PETER J. FENTON, Superintendent,
Rahway State Prison, and
IRWIN I. KIMMELMAN, Attorney General,
State of New Jersey,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS ON THE MERITS

IRWIN I. KIMMELMAN
Attorney General of New Jersey
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625
(609) 984-4801

Attorney for Respondents

ANNE C. PASKOW
Deputy Attorney General
Attorney of Record

Of Counsel and on the Brief
ANNE C. PASKOW
ALLAN J. NODES
DEBRA L. STONE
LINDA L. YODER
GILBERT G. MILLER
Deputy Attorneys General
Division of Criminal Justice

THE SUPERIOR APPELLATE PRINTING COMPANY
P.O. Box 363 Area Code 609
Cranbury, N.J. 08512 443-4202

QUESTIONS PRESENTED

1. Does the presumption of correctness in 28 U.S.C. § 2254(d)(8) apply to a state court's finding that a suspect's decision to speak to police officers was a product of his rational intellect and an exercise of his free will?

2. Was petitioner's confession voluntary?

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JURISDICTION

Respondents agree that 28 U.S.C. § 1254(1) is the basis for this Court's jurisdiction.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V:

> . . . [N]or shall any person . . . be compelled in any case to be a witness against himself . . .

United States Constitution, Amendment XIV:

> [N]or shall any State deprive a person of life, liberty, or property, without due process of law . . . .

United States Code, Title 28 § 2254(d):

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --
>
> > (1) that the merits of the factual dispute were not resolved in the State court hearing;
> >
> > (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered

(1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

This case involves the brutal, random murder of seventeen year-old Deborah Margolin. Deborah lived with her parents and three brothers on a farm in rural East Amwell Township, New Jersey. (T155-9 to 14; T155-23 to 156-13).[1] On the morning of August 13, 1973, Deborah was sunbathing on the patio of the farmhouse. At approximately 11:15 a.m., petitioner drove his dusty, white automobile onto the property and sounded its horn several times. The automobile had two noticeable dents on its right side and its trunk was tied shut. Deborah approached petitioner to inquire about his presence on the property. (T166-7 to 167-24; T180-4 to 25). Her brothers Daniel and Bernard, who were in the house, observed this encounter. (T167-2 to 169-11; T180-4 to 7). Daniel described petitioner as an "average" looking man who appeared to be a factory worker. He was wearing loose-fitting clothes and his shirt was lighter in color than his pants. (T169-17 to 170-2). Petitioner informed Deborah that there was a heifer loose at the bottom of the driveway and asked if she needed help catching it. (T168-16 to 24). Deborah declined his assistance. (T168-24). As petitioner drove away,

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[1] Ja designates the Joint Appendix.
R1 designates the Indictment.
R2 designates Tape, August 13, 1973.
R3 designates Tape, August 14, 1973.
R4 designates Transcript of R3, set forth at Ja4 to 38.
R5 designates Trial Transcript (including pre and post trial hearings).
R6 designates Judgment of Conviction.
R7 designates Petitioner's Notice of Appeal to State Appellate Division.
R8 designates Brief in Support of R7.
R9 designates Brief in Opposition to R7.
R10 designates Appellate Division Decision.
R11 designates Petition for Certification to State Supreme Court.
R12 designates Reply to R11.
R13 designates Order Granting Certification.
R14 designates State's Supplemental Brief.
R15 designates State's Supplemental Letter.
R16 designates the Presentence Report.

Within R5, the following designations are used: VT refers to the motion for change of venue transcript of October 5, 1973. T refers to the trial transcript of December 3 to 6, 1973. There will be no further citations to R5, and the above designations will be used.

Deborah entered her brother's Corvair and proceeded down the driveway in search of the heifer. (T169-6 to 16). This was the last time she was seen alive.

Approximately 30 minutes later, Bernard Margolin retrieved the Corvair, which was near the end of the driveway one-quarter mile away from the farmhouse. The keys to the automobile were in the ignition. (T173-2 to 22; T177-16 to 178-1; T183-4 to 14). When Deborah failed to return home, the family began to search for her. (T157-4 to 21).

A short time later, Deborah's father, Dr. Solomon Margolin, discovered her lifeless body face down in a nearby creek. (T162-10 to 23). Deborah's throat had been slashed and her body mutilated. (T197-3 to 7). She was clad only in the top part of her bathing suit, which had been pulled down around her waist. The bathing suit bottom and her underpants were found in the water a short distance away. (T197-1 to 23).

An autopsy later revealed that Deborah died from a deep stab wound to her neck that had severed her windpipe and jugular vein. Deborah was also stabbed through her vagina, in her right breast and nipple, near her pelvis and rectal area, and on her forearm. (T412-5 to 422-10).

After responding to the scene of the crime, the police obtained descriptions of the stranger and his automobile from Daniel and Bernard Margolin. (T86-19 to 87-7). Trooper Robert Scott, who had arrested petitioner on a sex offense charge one month earlier, recognized that these descriptions fit petitioner and his vehicle. (T86-1 to 18).

At 10:40 p.m. on the evening of the murder, State Police Detective Charles Boyce and Trooper Scott went to the P.F.D. Plastics Factory in Flemington, New Jersey, where petitioner worked the evening shift. (T270-5 to 10). Detective Boyce observed an automobile in the parking lot that fit the description of the suspect's vehicle. (T270-1 to 14). Boyce noticed a wet spot in the front passenger seat of the vehicle. (T270-19 to 272-6). Petitioner was summoned to the parking lot, where he admitted that the vehicle belonged to him. (T270-22 to 24; T99-24 to 100-3). During this interview, petitioner admitted that he carried a penknife and voluntarily gave it to Detective Boyce. (T272-7 to 13). Petitioner also consented to a search

of his locker and to seizure of clothing discovered there. (T274-22 to 275-8). Portions of this conversation were tape recorded. (R2). Petitioner then voluntarily accompanied the officers to the police barracks. (T275-19 to 276-2).

Petitioner waited in the station kitchen with Trooper Scott for approximately two hours. (Ja5). He was not questioned about the murder during this time. (T80-18 to 23). At approximately 1:47 a.m., Detective Boyce commenced a tape recorded interview. At the beginning of the interview, Officer Boyce gave petitioner *Miranda* warnings. (Ja5 to 6). Petitioner voluntarily waived his right to counsel and his right to remain silent. (Ja6).

Initially, petitioner denied knowledge of, or participation in, the murder. (Ja17; T299-23 to 300-1). He alleged that he had been at the Ringoes, New Jersey post office at 11:00 a.m. on the morning of the murder, only 15 minutes prior to Deborah's disappearance, and that he had returned to his house approximately one hour later. As petitioner's house was only a 20 minute drive from the post office, Boyce questioned him about the length of time it took him to drive home. Petitioner was evasive as to the precise time of his arrival there. (Ja7 to 10; T331-4 to 13). Boyce expressed his concern about the 40 minute gap in petitioner's account of his day. (Ja10).

Boyce next set forth in detail the evidence against petitioner: a witness observed a vehicle fitting the unique description of petitioner's automobile at the Margolin house shortly before Deborah's disappearance; the witness' description of the man who informed Deborah of the missing heifer fit petitioner; and fresh blood stains were present on the front seat of petitioner's vehicle. (Ja10 to Ja14). Boyce also indicated that the police had obtained a sample of what appeared to be blood from the front steps of petitioner's home. (Ja12).[2] When asked what conclusion he would draw from this evidence, petitioner responded, "That I'm the guy that, that did this." (Ja13).

Boyce then indicated that he did not believe that petitioner had a criminal mind. (Ja14). He believed, rather, that petitioner had a "problem" and expressed his concern. (Ja14 to 16). At this point,

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2 This evidence was not mentioned at trial. *Miller v. Fenton*, 741 F.2d 1456, 1468 (3d Cir. 1984) (Gibbons, J., dissenting).

petitioner asked for confirmation that Deborah Margolin was dead and was incorrectly informed that she had died in the hospital only a short time before. (Ja16).[3]

Boyce again confronted petitioner with the evidence implicating him but petitioner continued to deny his involvement in the crime. (Ja17). Boyce then changed his approach and asked petitioner what he thought about the crime. Petitioner responded: "I think whoever did it really needs help." (Ja17). Petitioner also stated his opinion that the perpetrator had a "mental problem" and that "they should be examined. . . ." (Ja19). Boyce asked petitioner whether he had ever been examined by a psychiatrist, and petitioner revealed that he had been undergoing psychiatric treatment as a condition of his parole. (Ja19). Boyce briefly explored petitioner's feelings towards his psychiatrist and parole officer to determine whether he blamed them for not helping him. (Ja19 to 20). Boyce continued to offer petitioner help, stating that he was petitioner's "brother." (Ja15 to 24). Boyce also told petitioner that in his mind petitioner was not responsible for the murder. (Ja22). He told petitioner that the crime was going to bother him until he told the truth and urged him, "Don't, don't, don't let it eat you up, don't, don't fight it." (Ja22).

Petitioner then admitted that he was the person who drove onto the Margolin property and informed Deborah of the loose heifer. (Ja22). He also admitted that he walked into the woods with Deborah in search of the animal. (Ja22). Petitioner claimed, however, that another man had grabbed Deborah and "cut" her. (Ja23). Petitioner claimed to have engaged in a struggle with this purported attacker, who allegedly cut petitioner's hand and ran away. (Ja23). Earlier, petitioner had stated that he had injured his hand on some loose glass in his automobile. (T279-23 to 25; T324-3 to 325-7).

Boyce expressed disbelief in petitioner's story and urged petitioner to "tell [him] the truth," stating that " the truth prevails in the end, Frank." (Ja27). Petitioner expressed an awareness that his statements would be used to convict him. (Ja26 to 28). Petitioner also expressed concern over what "this" would do to his father. (Ja28).

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3 Deborah Margolin was dead when her father discovered her mutilated body in the creek. (T162-10 to 23).

Boyce told petitioner that his father would understand and that he should simply state the truth, as concealing the crime was "eating [him] up." (Ja29). Petitioner then confessed to murdering Deborah Margolin, but denied mutilating her body. (Ja29 to 37).

Petitioner agreed to sign a written statement embodying his confession. (Ja38). Shortly after the interview, however, petitioner slid off his chair, stared straight ahead and maintained a blank look on his face. When petitioner made no verbal responses to police inquiries, the police summoned a first aid squad to transport petitioner to the Hunterdon Medical Center. (T84-19 to 90-14). Petitioner subsequently testified at the *Miranda* hearing that he had no recollection of the confession. (T112-19 to 113-5).

Petitioner was indicted by the Hunterdon County Grand Jury (Ind. No. 320M72) for murdering Deborah Margolin in violation of N.J. Stat. Ann. §§ 2A:113-1 and 113-2 (West 1971). (R1). On October 5, 1973, the Honorable George Y. Schoch, A.J.S.C., granted petitioner's motion for a change of venue. The trial was then transferred to Mercer County. (VT9-2 to 10-8).

On December 3 to 6, 1973, petitioner was tried before Judge Schoch and a jury. On December 4, Judge Schoch found that petitioner's confession was voluntary and could be introduced at trial. (T142-2 to 147-3). In addition to petitioner's confession, the State produced extrinsic evidence which plainly revealed petitioner's guilt. The investigating officers discovered footprints throughout the creek area where the body was found. (T200-6 to 210-17). One of these footprints could be measured exactly due to the muddy surface of the ground. (T200-6 to 201-17). These measurements were compared to one of petitioner's shoes, which was obtained the morning following the discovery of the body. The two measurements were similar. (T201-24 to 208-18; T268-10 to 13).

In addition, a comparison of the victim's blood with a bloodstain on the front seat of petitioner's automobile indicated similar blood types. (T361-16 to 20; T367-7 to 17). Petitioner's blood was of a different type. (T367-18 to 23). Moreover, the officer who investigated the accident in which petitioner's vehicle was damaged testified that no blood was found on the seat at that time. (T404-7 to 10). The State also established that shortly after Deborah Margolin disappeared, two men engaged in road construction work a couple

of miles from the Margolin farm observed petitioner, who had a "frightened look on his face," drive quickly past them. (T384-3 to 386-20; T387-1 to 389-9).

The jury found petitioner guilty of murder in the first degree. (T511-8 to 9). On January 11, 1974, petitioner was sentenced to the New Jersey State Prison for a life term, to run consecutively to an earlier sentence for carnal abuse. (R6). In a *per curiam* opinion dated October 27, 1975, the Superior Court of New Jersey, Appellate Division, reversed petitioner's conviction on the ground that his confession was involuntary. (Ja39 to 54). On March 2, 1976, the New Jersey Supreme Court granted the State's petition for certification. (R11; R13). On May 24, 1978, that court reinstated petitioner's conviction. *State v. Miller*, 76 N.J. 392, 388 A.2d 218 (1978). (Ja55 to 97).

On April 3, 1982, petitioner filed a petition for a writ of habeas corpus with the United States District Court of New Jersey. On February 23, 1983, United States Magistrate John W. Devine recommended that the petition be dismissed with a certificate of probable cause. (Ja98 to 103). On June 17, 1983, the District Court filed a letter-opinion dismissing the petition with a certificate of probable cause. (Ja104 to 106). On July 15, 1983, petitioner filed a notice of appeal with the United States Court of Appeals for the Third Circuit. (Ja107). On August 17, 1984, that court affirmed the decision of the District Court. *Miller v. Fenton*, 741 F.2d 1456 (3d Cir. 1984). (Ja108 to 166). On August 30, 1984, petitioner filed a petition for a rehearing *en banc*, which was denied on September 28, 1984. (Ja167).

On April 11, 1985, this Court granted petitioner's petition for *certiorari*. (Ja168).

SUMMARY OF ARGUMENT

1. The United States Court of Appeals for the Third Circuit properly applied the presumption of correctness in 28 U.S.C. § 2254 (d) (8) to the New Jersey courts' finding that petitioner's confession was a product of his rational intellect and an exercise of his free will. The purpose of § 2254 (d) (8) is to promote federalism by limiting federal collateral review of state court fact-findings in criminal cases. Accordingly, this Court has taken an expansive view of the term "fact" in its recent opinions. These cases compel the conclusion that the question whether a suspect's will was overborne is a factual question.

The mere fact that the determination of whether a suspect's will was overborne involves an assessment of the totality of the circumstances does not render it a mixed question of law and fact. Indeed, this Court has recognized that a determination that an individual's consent to a search was voluntary is a factual determination even though it is made after an assessment of the totality of the circumstances. The phrase "totality of the circumstances" merely defines what the court should consider in making this factual determination.

The phrase "mixed question of law and fact" is properly used only to refer to those situations where the legal standard and the fact-findings are so intermingled that the appellate court must review the evidence to ensure that the lower court comprehended the legal standard. The constitutional standard for voluntariness does not fall within this definition. The constitutional standard for voluntariness has been well defined by case law. Moreover, state courts deal with confession cases on a daily basis and therefore have developed an expertise in this area. Thus, after a federal court has determined that the state court fact finder has applied the correct legal standard, the court should defer to the fact-findings made by the state court.

In this case, the United States Court of Appeals for the Third Circuit concluded that the New Jersey courts had applied the correct legal standard. The court, therefore, properly deferred to the New Jersey courts' fact-findings when making its voluntariness ruling.

2. Petitioner has failed to meet the heavy burden of proving either that the interrogation methods employed by the police were *per se* unconstitutional or that they overbore his will. Hence, petitioner has

failed to establish that his confession was involuntary. Petitioner was advised of, and clearly understood, his right to remain silent and to terminate the interrogation after it had begun. Several times during the course of the interrogation, petitioner expressed his understanding that the detective was seeking evidence to use against him. Consequently, petitioner has failed to demonstrate that the detective's suggestion that the perpetrator needed help rather than punishment led him to confess with the expectation that he would not be prosecuted. Similarly, petitioner has failed to establish that the minor inaccuracies related to him by the police had the capacity to affect his decision to confess. There is thus neither a legal nor a factual basis for reversing the conclusion of both the United States Court of Appeals for the Third Circuit and the state courts that petitioner's confession was voluntary.

ARGUMENT

POINT I

THE PRESUMPTION OF CORRECTNESS WAS PROPERLY APPLIED IN THIS CASE.

28 U.S.C. § 2254(d) provides that "a determination after a hearing on the merits of a factual issue, made by a state court of competent jurisdiction . . . shall be presumed to be correct" unless the petitioner establishes that the "factual determination is not fairly supported by the record." The question before this Court is whether the United States Court of Appeals for the Third Circuit properly applied this presumption to the New Jersey state courts' determination that the interrogation techniques employed by the police did not overbear petitioner's will. Petitioner contends that the presumption of correctness does not apply to this finding because the question of whether his will was overborne is either a pure question of law or a mixed question of law and fact. It is respondents' position that whether a defendant's will was overborne is a question of fact. Therefore, both case law and policy dictate that the presumption apply.

Petitioner sought a writ of habeas corpus under 28 U.S.C. § 2254(a) in the United States District Court for the District of New Jersey, contending that his confession was coerced and that its use at trial violated the United States Constitution. It is beyond dispute that 28 U.S.C. § 2254 grants federal courts authority to independently review the applicable constitutional law and to ascertain whether the state courts applied the correct legal standard. *Townsend v. Sain*, 372 U.S. 293, 318 (1963). It is equally well-settled that factual findings made by a state court are entitled to a strong presumption of correctness unless a petitioner can prove that they are not fairly supported by the record. 28 U.S.C. § 2254(d) (8); *see, e.g., Sumner v. Mata*, 449 U.S. 539, 550 (1981). Hence, in each case the federal court must distinguish between issues of law and questions of fact to determine the appropriate standard of review.

In this case, the Third Circuit found that the circumstances surrounding petitioner's confession did not render it *per se* involuntary. *Miller v. Fenton*, 741 F.2d 1456, 1465-1467 (3d Cir. 1984). The court also held that the state court had applied the correct legal standard. *Id.* The court next reviewed the factual

findings underlying the New Jersey courts' determination that petitioner's will was not overborne. In reaching this conclusion the New Jersey Supreme Court found that:

> Miller was a man of reasonable intelligence who had experience with and understood the workings of the criminal justice system; that Miller's distress during the interview was a product of his realization of what he had done, not of coercive pressure by Boyce; that Miller was not deceived into believing that Boyce was anything other than a police officer investigating a serious crime for which Miller was the prime suspect; and, that Miller was well aware that, if he confessed, he would be handled through the criminal justice system. The court then concluded, on the basis of these findings, that Miller's confession was the product of his free will, rather than psychological coercion. [*Id.* at 1466, citing *State v. Miller*, 76 N.J. 392, 404, 388 A.2d 218, 224 (1978)].

The Third Circuit held that petitioner had failed to demonstrate that these findings were not fairly supported by the record. *Id.* at 1467. Thus, the court deferred to these findings when reaching its ultimate conclusion that petitioner had failed to set forth convincing evidence demonstrating that his confession was involuntary. *Id.*[4]

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[4] Petitioner contends that a majority of the Courts of Appeals have declined to apply the presumption of correctness to a state court's finding that a defendant's will was not overborne. (Pb26 n.8). On the contrary, respondents submit that petitioner misconstrues the import of these cases. Five circuits have expressly applied the presumption of correctness to the factual portions of the voluntariness inquiry. *Miller v. Fenton*, 741 F.2d 1456 (3d Cir. 1984); *Alexander v. Smith*, 582 F.2d 212, 218-219 (2d Cir. 1978); *Miller v. Maryland*, 577 F.2d 1158, 1159 (4th Cir. 1978); *Lyle v. Wyrick*, 565 F.2d 529, 532-533 (8th Cir. 1977); *Fowler v. Jago*, 683 F.2d 983, 988 (6th Cir. 1977) (presumption of correctness applies unless determination not fairly supported in the record). Moreover, although the Fifth Circuit espouses the view that voluntariness is a mixed question of law and fact entitled to independent review, it has ruled that the factual components of the voluntariness determination must be afforded substantial deference. *See Brantley v. McKaskle*, 722 F.2d 187, 189 (5th Cir. 1984). In addition, petitioner concedes that some courts have followed *LaVallee v. Delle Rose*, 410 U.S. 690 (1973) and have

The starting point for assessing the scope of the presumption of correctness is the purpose of the statute. Section 2254(d) does not provide explicit guidance regarding how to distinguish a question of law from a question of fact. *Cf. Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (discussing Fed.R.Civ.P. 52(a)). The purpose

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[4] cont'd

presumed the correctness of the state court fact findings. (Pb26 n.8). *See, e.g., Jones v. Cardwell*, 686 F.2d 754, 757 (9th Cir. 1982); *Hallerman v. Duckworth*, 700 F.2d 371, 396 (7th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 116 (1983). Only three circuits have expressly taken the position that voluntariness is a question of law entitled to *de novo* review on habeas. *United States v. Robinson*, 698 F.2d 448, 455 (D.C. Cir. 1983); *Sullivan v. Alabama*, 666 F.2d 478 (11th Cir. 1982); *Johnson v. Hall*, 605 F.2d 577 (1st Cir. 1979). The continuing force of the Eleventh Circuit's ruling in *Sullivan* may be called into question in light of its recent decision in *Price v. Wainwright*, ___ F.2d ___ (11th Cir. May 13, 1985) (slip op.), which held that the presumption of correctness applied to the factual component of a mixed question of law and fact. In so ruling, the court stated that:

> [a] competency determination, as a mixed question of law and fact, has two components. The legal standard, what a person must know or be able to do in order to be competent, is whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 102, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). The factual question is whether the defendant knows or is able to do what is required by the law. The ultimate decision that a person is competent, then, is a determination which the federal court need not presume correct because the decision alone does not tell what law was applied and what facts were found in that decision. When the state court articulates the right law, however, and then finds that the defendant knows or has the ability to meet the legal standard, that finding should be deemed correct if the underlying facts upon which the state court based its decision are fairly supported by the record. In assessing those underlying facts, the federal court should usually defer to the credibility choices of the state court. [s.o. at 2].

Thus, only the First Circuit and the D.C. Circuit have clearly held that the presumption does not apply to the voluntariness issue. Finally, so far as respondents have been able to ascertain, the Tenth Circuit has not addressed this issue.

of the statute indicates, however, that a federal court may not engage in independent review of state court fact-finding merely because it is dispositive of a federal constitutional claim. *Id.* at 287-290. By enacting § 2254(d), Congress firmly rejected any claim that plenary federal fact-finding is constitutionally mandated in habeas cases. "Minimal respect for state processes . . . precludes any presumption that the state courts will not safeguard federal constitutional rights." *Middlesex Ethics Commission v. Garden State Bar Association*, 457 U.S. 423, 431 (1982). *Accord, Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976). Indeed, federalism mandates the opposite presumption--a presumption that state courts have earnestly adhered to their oath to uphold the Constitution. *Sumner v. Mata*, 449 U.S. at 549. Section 2254(d) (8) is a codification of this presumption.

The 1966 amendments embodied in 28 U.S.C. § 2254(d) (8) were designed to facilitate summary disposition of habeas petitions by limiting the federal court's jurisdiction to review state court fact-findings. *Sumner v. Mata*, 449 U.S. at 539 n.2.; H.R. Rep. No. 1892, 89th Cong., 2d Sess. (1966) (hereinafter cited as *House Report*); S. Rep. No. 1797, 89th Cong., 2d Sess. (1966) (hereinafter cited as *Senate Report*). The primary purpose of this legislation was to reduce the amount of intrusion by federal habeas courts into state criminal justice systems. *House Report* at 3-7. A second purpose of this legislation was to ease the workload of the federal judiciary, which was overburdened by a substantial increase in the number of habeas petitions filed by state prisoners. *House Report* at 3-7; *Senate Report* at 1-2. It is thus clear that § 2254(d) was intended to facilitate federalism by alleviating friction between federal and state courts engendered by federal habeas corpus review. *Sumner v. Mata*, *supra* U.S. at 549-550.

The *House Report* explains that habeas corpus relief was traditionally available to a state petitioner only upon a showing that a state court lacked jurisdiction to render a judgment of conviction against him. *House Report* at 4. This was consistent with the view that habeas corpus, while a "most important safeguard of individual liberty," was not designed to be a writ of review for state court error in the federal courts. *Id. See also* Judicial Conference of America, *Report of the Committee on Habeas Corpus*, 33 F.R.D.

363, 368 (1963) (hereinafter cited as *Judicial Conference Report*); *see generally* Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171 (1949).

In a series of cases decided during the 1950's and 1960's, this Court enlarged upon the type of constitutional claim that could be raised in a federal habeas corpus proceeding. *See, e.g., Townsend v. Sain*, 372 U.S. 293 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Fay v. Noia*, 372 U.S. 391 (1963); *Brown v. Allen*, 344 U.S. 437 (1952). These cases led to a sharp increase in the number of habeas applications. *See generally House Report* at 4-7.[5] Ninety-five percent of these habeas applications were meritless and thus constituted a needless and time-consuming increase in the workload of the federal judiciary. *House Report* at 5. *See also Senate Report* at 1-2; *Judicial Conference Report* at 368. Moreover, such applications interfered with state court procedures and considerably delayed proper enforcement of valid state court judgments, causing friction between the federal and state courts. *House Report* at 5. *See also Judicial Conference Report* at 368. As a result, various state and federal groups lobbied for restrictions on federal collateral review of state court criminal judgments.[6] These efforts culminated in the enactment of § 2254(d) (8). *See generally House Report; Senate Report.*

It is clear from the committee reports that the sponsors of the 1966 amendment hoped to relieve the workload of the federal judiciary and to restrict unnecessary federal intrusion into state criminal justice matters by accelerating the rate of summary disposition of habeas applications filed by state prisoners. *See also* 110 Cong. Rec.

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[5] The percentage of cases disposed of after an evidentiary hearing also increased after those decisions. Wright and Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-finding Responsibility*, 75 Yale L.J. 895, 921 n.77 (1963). Judge J. Skelly Wright, a member of the Committee on Habeas Corpus, has speculated that this percentage increase was directly attributable to *Townsend v. Sain*, 372 U.S. 293 (1963), which operated to prevent district court judges from denying evidentiary hearings. *Id.*

[6] These groups included the Judicial Conference, the Conference of State Chief Justices, the American Bar Association, the National Association of Attorneys General and the United States Department of Justice. *House Report* at 5; *Senate Report* at 1-2. *See also Judicial Conference Report* at 14-30; 110 Cong. Rec. 14680 (1964) (remarks of Representative Wyman).

14678-14684 (1964) (in particular, remarks of Representatives Lindsay and Cellar).

This legislative history demonstrates that the purpose of § 2254(d) was to promote principles of federalism by limiting the readjudication of state court fact-findings to those situations where a petitioner was not afforded a full and fair hearing or where a petitioner could demonstrate that the fact-findings were not substantially supported by the record. *Sumner v. Mata*, 449 U.S. at 549-552. In light of the remedial nature of this statute, its terms should be broadly construed to effectuate its purpose of promoting federalism. *Cf. Rose v. Lundy*, 455 U.S. 509, 516-518 (1982) (policies underlying enactment of statutory provisions are relevant to determine its scope).

Accordingly, this Court's recent decisions have adopted an expansive approach to the scope of § 2254(d) (8). In *Patton v. Yount*, ___ U.S. ___, ___, 104 S.Ct. 2885, 2892 (1984), for example, this Court ruled that whether or not a juror is impartial is clearly a question of fact governed by the presumption of correctness. *See also Wainwright v. Witt*, ___ U.S. ___, ___, 105 S.Ct. 844, 854-855 (1985) (whether a juror was properly excused for bias in a capital case due to his feelings regarding the death penalty is a question of fact); *Rushen v. Spain*, ___ U.S. ___, ___, 104 S.Ct. 453, 456-457 (1983) (whether jury's deliberations were biased is a question of fact entitled to deference under § 2254(d)); *Smith v. Phillip*, 455 U.S. 209, 218 (1982) (judicial fact-finding regarding juror bias entitled to presumption of correctness).

Similarly, this Court ruled that the voluntariness of a consent to search is a factual question. *Schneckloth v. Bustamonte*, 412 U.S. 216, 227 (1973). In *Schneckloth*, this Court discussed the coerced confession cases, such as *Culombe v. Connecticut*, 367 U.S. 568 (1961), and noted that each case involved an assessment of the totality of the circumstances. This Court went on to state that "similar considerations lead us to agree with the courts of California that the question whether a consent to a search was in fact voluntary or was the product of duress or coercion, express or implied, *is a question of fact* to be determined from the totality of all the circumstances." 412 U.S. at 227 (emphasis added). This Court should adhere to these rulings to hold that a state court's findings that a confession was a

product of free will rather than coercion is a finding of fact entitled to deference.

Petitioner has seized on the phrase "historical fact," which appears in a number of this Court's decisions, to argue that the term "fact" as used in § 2254(d) encompasses only objective facts such as the date of the offense or the defendant's age. (Pb17). Petitioner contends that all other fact-findings are "mixed questions of law and fact" not subject to the presumption. This narrow definition of fact conflicts with the purpose of § 2254(d) (8) and the recent case law discussed earlier.[7] When applying § 2254(d) (8), there is no sound reason for distinguishing between "objective" facts, which petitioner labels "historical facts," and other facts. The terms of the statute make no such distinction. See *Sumner v. Mata*, 449 U.S. at 547.

Surely, the significance of a particular fact-finding to the resolution of a constitutional claim cannot be dispositive of the question whether the presumption applies to a particular type of fact-finding. *Cf. Pullman-Standard v. Swint*, 456 U.S. at 288. In many instances, a state court's findings relating to objective facts will resolve the constitutional claim. For example, a state court finding which rejects a defendant's claim that he was physically abused prior to giving a confession and accepts the arresting officer's claim that no physical confrontation occurred may conclusively resolve a defendant's constitutional challenge to the admissibility of his confession at trial. Even petitioner implicitly concedes, however, that such findings are entitled to the presumption of correctness on habeas review when they are substantially supported by the record. (Pb14 to 21). Moreover, the statutory purpose of promoting federalism would preclude any such distinction.[8]

Similarly, the statute does not limit the presumption to fact-findings involving an evaluation of credibility or demeanor.[9] Accordingly, this Court has refused to restrict the scope of § 2254 to fact-findings made by a state trial court. In *Sumner v. Mata*, this Court explained that:

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7 As the purpose of the 1966 amendment was to change the scope of review in habeas cases, cases predating the 1966 amendment to § 2254(d) cannot be dispositive on the interpretation of that amendment. Indeed, in *Patton v. Yount*, ___U.S. ___, 104 S.Ct. 2885 (1984), this Court cautioned against placing undue reliance on the use of the phrase "mixed question of law and fact" in opinions which predate the presumption of correctness. This Court noted that during this earlier period jurists "clearly did not attach the same significance to the phrase 'a question of mixed law and fact' that we do today under modern habeas law." *Id.* at ___, 104 S.Ct. at 2892 n.12.

Moreover, even prior to the enactment of the 1966 amendment to § 2254(d), this Court acknowledged that federalism required *some* deference to factual findings made by the state courts. In *Culombe v. Connecticut*, 367 U.S. 568 (1961), for example, this Court observed that:

> great weight, of course, is to be accorded the inferences which are drawn by the state courts. In a dubious case, it is appropriate with due regard to federal-state relations, that the state court's determination should control. [*Id.* at 605].

See also Blackburn v. Alabama, 361 U.S. 199, 200-201 (1960) (Court made plenary review of facts only after finding that petitioner provided substantial support in record for his contention that his confession was involuntary); *cf. Lisenba v. California*, 314 U.S. 219, 238 (1941) (state fact-finding accepted unless it is so lacking in support that it violates due process). The purpose of § 2254(d) (8) was to promote federalism by further restricting federal readjudication of state court findings. Thus, this amendment should not be read merely as an endorsement of the then current practice.

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8 The dissenting opinion in the Third Circuit suggests that no deference should be given to factual findings critical to the voluntariness finding because a state court arguably could defeat a valid federal claim by engaging in distorted fact-finding. *Miller v. Fenton*, 741 F.2d 1456, 1474-1475 n.7 (3d Cir. 1984) (Gibbons, J., dissenting). It is instructive to observe that the cases relied on for this proposition predate the 1966 amendment. The dissent acknowledges that recent opinions of this Court reject this approach. *Id.* Distrust of state court fact-finders cannot serve as a valid reason for refusing to apply the presumption of correctness.

9 Both types of fact-finding generally involve the evaluation of credibility and demeanor. Only in rare cases could a state court evaluate the effect of the interrogation on a particular defendant without assessing the credibility and demeanor of the witnesses at a *Miranda* hearing.

Even in this case, where the interrogation was taped, the testimony at the *Miranda* hearing provided important background information such as what took place before and after the taped interview. As petitioner testified at this hearing, the trial court also had an opportunity to assess such factors as petitioner's intelligence and his understanding of his rights.

> [s]ection 2254(d) by its terms thus applies to factual determinations made by state courts, whether the court be a trial court or an appellate court. *Cf. Swenson v. Stidham*, 409 U.S. 224, 230, 34 L.Ed.2d 431, 93 S.Ct. 359 (1972).
>
> This interest in federalism recognized by congress in enacting § 2254(d) requires deference by federal courts to factual determinations of all state courts. [449 U.S. at 547].[10]

Thus, even when the federal court has before it the same record upon which the state court relied in making its factual findings, § 2254(d) (8) precludes the federal court from substituting its judgment for that of the state court.

The Third Circuit characterized the findings at issue here as "state of mind" findings. *Miller v. Fenton*, 741 F.2d at 1465. State of mind has traditionally been considered a factual question. *See Culombe v. Connecticut*, 367 U.S. 568, 603 (1961) (mental state described as "psychological" fact). In recent decisions, this Court has consistently applied the presumption to this type of finding. In *Marshall v. Lonberger*, 459 U.S. 422, 431-435 (1983), for example, this Court examined the scope of review governing a finding that a guilty plea was voluntary. This Court stated that although the governing standard as to whether a plea of guilty is voluntary for purposes of the Federal Constitution is a question of federal law, what the record shows regarding a guilty plea, what inferences could properly be drawn from those facts and related questions, are obviously questions of "fact" subject to the presumption of correctness. *Id.* at 431-432. *See also Wainwright v. Witt*, ___U.S. ___, ___, 105 S.Ct. 844, 854-855 (1985); *Patton v. Yount*, ___ U.S. at ___, 104 S.Ct. at 2892; *Rushen v. Spain*, ___U.S. at ___, 104 S.Ct. at 456-457; *Smith v. Phillip*, 455 U.S. at 218; *Schneckloth v. Bustamonte*, 412 U.S. at 248-249. These cases demonstrate that factual decisions involving state of mind are entitled to deference.

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[10] This Court need not decide in this case whether Fed. R. Civ. P. 52(a), which governs the scope of review on direct appeal, is coextensive with § 2254(d) (8). The doctrine of federalism suggests, however, that collateral federal review of state court fact-findings may be more limited than federal appellate review of findings of lower federal courts.

In sum, the remedial purpose of § 2254--to promote federalism by requiring federal habeas courts to accord substantial deference to state court fact-findings--compels a broad interpretation of the term "fact." Accordingly, in recent opinions this Court has taken an expansive approach to the scope of the presumption. This Court should adhere to this recent precedent to affirm the Third Circuit's holding that the presumption applies to factual findings underlying a voluntariness determination.

Petitioner next contends that even if a determination of what effect the circumstances surrounding the interrogation had on petitioner's decision to confess is a factual determination, this finding should not be given deference. In this regard, petitioner maintains that the voluntariness finding is a mixed question of law and fact because when making its ultimate decision on voluntariness, a court must make both legal judgments and factual determinations. The presumption of correctness does not apply to mixed questions of law and fact. *See Strickland v. Washington*, ___ U.S. ___, ___, 104 S.Ct. 2052, 2070 (1984). Respondents disagree that the voluntariness question is a "mixed question of law and fact." The factual findings underlying the voluntariness determination are therefore entitled to deference.

The term "voluntariness" has been employed by this Court to describe both the legal standard used to evaluate a defendant's confession and the factual question of whether a defendant's will has been overborne. The constitutional standard for evaluating voluntariness is essentially a two part test: (1) whether the methods used by the police were in and of themselves offensive to due process, and (2) if the methods were not in and of themselves violative of due process, whether in the totality of the circumstances the defendant's confession was ". . . a product of [his] rational intellect and [his] free will. . . ." *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960).

The former inquiry involves a legal pronouncement, and thus a federal court has the obligation to independently determine whether the standard was applied correctly. *Townsend v. Sain*, 372 U.S. at 318. Once it has been established that the circumstances surrounding the interrogation were not *per se* unconstitutional, however, the task of ascertaining whether a particular individual's will was overborne involves a purely factual question. *Cf. Patton*

v. *Yount*, ____ U.S. at ____, 104 S.Ct. at 2892 n.12 (voluntariness of plea is a question of fact). This fact-finding is entitled to deference.

At this juncture, only the second component of the constitutional standard is at issue. Contrary to the accusation made by the dissent, the Third Circuit did not apply the presumption of correctness to the state courts' holding that petitioner's confession was voluntary. The Third Circuit applied the presumption only to the state courts' findings involving the effect that the circumstances surrounding the interview had on petitioner's decision to confess. *Miller v. Fenton*, 741 F.2d at 1465. These findings and the finding whether petitioner's will was overborne are factual findings and not mixed questions of law and fact.

The phrase "mixed question of law and fact" is properly used only to refer to those situations where the legal standard and the fact-findings are so intermingled that the appellate court must review the evidence to ensure that the lower court comprehended the standard. *Fiske v. Kansas*, 274 U.S. 380, 385-387 (1927); *see Bose Corp. v. Consumers Union of United States*, ____ U.S. ____, ____, 104 S.Ct. 1949, 1962-1965 (1984). For example, in *Bose*, *supra*, this Court reaffirmed its position that First Amendment claims generally fall within this category observing that:

> the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited. Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas. [____U.S. at ____, 104 S.Ct. at 1962].

The Court concluded, therefore, that a finding of actual malice is entitled to independent review on direct appeal. *Id.* at ____, 104 S.Ct. at 1963-1964. *See also New York Times v. Sullivan*, 376 U.S. 254 (1964).

The *Bose* Court's rationale for its exercise of independent review is instructive, for it suggests that independent review is reserved for those areas of law where "the content of the rule is not revealed simply by its literal text." *Bose Corp. v. Consumers Union of United States*, ____U.S. at____, 104 S.Ct. at 1960. In such cases, which primarily encompass areas of law where the legal standard is still evolving, this Court has expressed the need for a more independent review of the facts to determine whether the trial court understood the substance of the legal standard.[11] *See* Monaghan, *Constitutional Fact Review*, 85 Colum.L.Rev. 229, 274-275 (1985).[12]

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11 Mixed questions of law and fact require independent review on habeas because the federal court must ensure that the correct legal standard was applied. This Court's decisions indicate that after a federal court has determined that the state court has applied the correct legal standard the state court's fact-finding are entitled to deference.

In *LaVallee v. Delle Rose*, 410 U.S. 690 (1973), for example, this Court considered the question of what deference should be afforded to a state court's finding of voluntariness when determining whether to hold an evidentiary hearing. This Court quoted extensively from *Townsend v. Sain*, 372 U.S. 293 (1963), which it labeled the precursor of § 2254(d):

> [T]he possibility of legal error may be eliminated in many situations if the fact-finder has articulated the constitutional standards which he has applied. [410 U.S. at 694, citing *Townsend v. Sain*, 372 U.S. at 314].

This Court's holding in *LaVallee* demonstrates that after the federal court determines that the correct legal standard has been applied and the facts found by the state court are supported by the record, then the determination of the state court as to the voluntariness of a defendant's statements satisfies § 2254(d). See 410 U.S. at 695.

12 Two recent opinions from this Court graphically illustrate this distinction. In *Wainwright v. Witt*, ____U.S. ____, 105 S.Ct. 844 (1985), this Court espoused a new standard governing the exclusion of jurors in death penalty cases. Consequently, the Court necessarily undertook an extensive review of the facts in the case to determine whether the trial court's actions complied with the new standard. This Court expressed its opinion, however, that the standard adopted in *Witt* was sufficiently clear that future applications of the standard to particular jurors would be deemed a factual question entitled to deference. *Id.* at 854-855.

In *Strickland v. Washington*, ____U.S. ____, 104 S.Ct. 2052 (1984), on the

It is thus clear that the factual components of the voluntariness inquiry are entitled to deference. An historical review of the voluntariness standard reveals different concerns from those involved in *Bose*. Unlike First Amendment standards, the constitutional test for determining voluntariness -- whether in the totality of the circumstances the confession is a product of a defendant's rational intellect and free will -- is sufficiently narrow and clear for reviewing courts to determine whether the state court applied the correct legal standard without undertaking *de novo* review of the facts. Moreover, the content of this standard has been well-defined in the significant body of Supreme Court case law interpreting the standard. As the Third Circuit cogently observed below, many of the cases cited for the proposition that voluntariness was a mixed question of law and fact predated *Miranda v. Arizona*, 384 U.S. 436 (1966), and involved development of the legal standard. *Miller v. Fenton*, 741 F.2d at 1463.[13] Consequently, as the "precise legal definition of voluntariness remained elusive . . . the Court engaged

12 cont'd

other hand, this Court stated that a determination whether counsel's performance was objectively reasonable or did not result in prejudice was a mixed question of law and fact not entitled to the presumption of correctness. The *Strickland* standard presupposes the need for further development of rules defining what constitutes reasonable assistance and expresses a preference that these rules be developed on a case by case basis. It is clear that a trial court's ruling concerning the adequacy of counsel's performance will include factual findings as to what happened and legal rulings as to the significance of counsel's actions. Consequently, a trial court's ruling that counsel's performance was reasonable is properly classified as a mixed question of law and fact. Monaghan, *Constitutional Fact Review*, 85 Colum.L.Rev. 299, 274-275 (1985).

13 *Miller* essentially followed the Third Circuit ruling in *Patterson v. Cuyler*, 729 F.2d 925 (3d Cir. 1984). In *Patterson* the Third Circuit noted that it had previously ruled that voluntariness was a mixed question of law and fact to which the presumption of § 2254(d) does not apply. 729 F.2d at 930. The Circuit Court went on to observe that it must re-examine the issue in light of this Court's more recent and fuller explanation of § 2254(d) in such cases as *Sumner v. Mata*, 455 U.S. 591 (1982) and *Marshall v. Lonberger*, 459 U.S. 422 (1983). The Third Circuit concluded that this recent precedent indicated that voluntariness was a question of fact to which § 2254(d) applied, provided that the correct legal standard had been applied by the state courts. 729 F.2d at 932.

in an independent, case-by-case review of the state courts' conclusions concerning voluntariness. . . ." *Id.* at 1463-1464. The prophylactic rules contained in *Miranda* and its progeny served well to narrow the scope of the trial court's inquiry. Hence, although a more independent evaluation of a state court's fact-findings may have been necessary in the past, there is no reason to conclude that plenary review by federal courts is required at this juncture. *Cf. Stone v. Powell*, 428 U.S. at 439 n.35 ("argument that federal judges are more expert in applying federal constitutional law is especially unpersuasive in context of search and seizure claims, since they are dealt with on a daily basis by trial level judges in both systems"). This Court should conclude, therefore, that the Third Circuit acted properly in affording deference to the state court fact-findings after it had determined that the state courts had applied the correct constitutional test.

POINT II

PETITIONER HAS FAILED TO DEMONSTRATE THAT HIS CONFESSION WAS INVOLUNTARY.

Petitioner has the burden in this case of proving that his confession to the murder of Deborah Margolin was not "voluntary." *See Sumner v. Mata*, 449 U.S. 539, 550 (1981); *Johnson v. Zerbst*, 304 U.S. 458, 468-469 (1938). Petitioner raises two challenges to the admissibility of his confession: (1) that the methods employed by the police were unconstitutional as a matter of law, regardless of whether his will to resist the interrogation tactics was *in fact* overborne, and (2) that the methods *in fact* overbore his will and compelled his confession. As discussed in Point I, *supra*, petitioner's first assertion involves a legal determination, requiring this Court's plenary review of such rulings below. The Third Circuit concluded that the interrogation techniques were not unconstitutional as a matter of law. *Miller v. Fenton*, 741 F.2d 1456, 1467 (1984). Respondents submit that the Third Circuit's legal conclusion was correct and should be affirmed by this Court.

Petitioner's second assertion, on the other hand, challenges a factual finding of the New Jersey state courts. The state courts' ruling on this issue is therefore entitled to substantial deference under 28 U.S.C. § 2254(d) (8), even if it is dispositive of petitioner's constitutional claim. *Cf. Pullman-Standard v. Swint*, 456 U.S. 273 (1982) (discussing standard of review under Fed.R.Civ.P. 52(a)). Thus, to obtain relief, petitioner must establish that the state court finding, that his will was not overborne, is not fairly supported by the record. 28 U.S.C. § 2254(d) (8). The Third Circuit found that petitioner had failed to meet this burden. *Miller v. Fenton*, 741 F.2d at 1467. Respondents submit that this ruling should be affirmed by this Court. Moreover, even if this Court were to undertake an independent review of the record in order to make its own fact-findings, respondents submit that petitioner has failed to demonstrate that his confession was coerced.

The Fifth Amendment provides that no person shall be compelled to give evidence against himself. U.S. Const. Amend. V. The Constitution, however, does not shield a defendant against all attempts to obtain incriminating evidence from him. *Culombe v. Connecticut*, 367 U.S. 568, 588 (1961). Rather, this Court's decisions in this area

are based upon the premise that "the public interest requires that interrogation. . . at a police station not completely be forbidden, so long as it is conducted fairly . . . ." *Id.* at 578-579, quoting *State v. Smith*, 32 N.J. 501, 550, 161 A.2d 520, 537 (1960), *cert. denied*, 364 U.S. 936 (1961).

A police officer is not restricted to merely asking a suspect whether he committed a crime and then ceasing all questioning if the suspect denies complicity.[14] *Culombe v. Connecticut*, 367 U.S. at 576, 579-592. On the contrary, police officers are permitted to use a variety of interrogation techniques to elicit a confession without running afoul of the Constitution. *See generally id.* at 570-587. The fact that an officer's sympathetic questioning and proffered understanding of a suspect's problem strikes a responsive chord in a suspect does not render such questioning unconstitutionally coercive. *See generally Rhode Island v. Innis*, 446 U.S. 291, 300-301 (1980).

A. Petitioner's Confession Was Not Involuntary As A Matter Of Law.

Initially, petitioner claims that his confession was involuntary as a matter of law. Specifically, he alleges that the police employed tactics "which included lies regarding incriminating evidence, misrepresentations as to the true role of the interrogating officer, express promises of psychiatric help and implied promises of exculpation." (Pb28). Respondents submit that the interrogation methods employed in the case were not improper as a matter of law.

Since 1936, when this Court first scrutinized the constitutional propriety of confessions made in the course of state criminal proceedings, this Court has recognized that certain interrogation tactics render the confessions produced thereby inadmissible as a matter of law under the Due Process Clause. *See Brown v. Mississippi*, 297 U.S. 278 (1936) (physical torture). *See, e.g., Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (incessant interrogation over several days); *Ward v. Texas*, 316 U.S. 547 (1942) (threats of violence); *Chambers v. Florida*, 309 U.S. 227 (1940) (egregiously long detention for

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[14] It is noteworthy that *Brewer v. Williams*, 430 U.S. 387 (1977), popularly known as the "Christian Burial" case, did not hold that the officers' statements to Williams were *per se* improper. This Court merely ruled that these statements constituted interrogation and were improper because Williams had requested counsel. *Id.* at 404-405.

interrogation purposes).[15] These tactics are so offensive that an injustice to society and the prisoner is deemed to have occurred. *Id.* at 583 n.25. In such circumstances, the veracity of those statements is irrelevant. *See Rogers v. Richmond*, 365 U.S. 534, 543-544 (1961). It follows, therefore, that a confession elicited by such tactics is excluded regardless of whether the individual subjected thereto has actually had his will overborne.

This Court has further recognized that while a certain method by itself may not be *per se* violative of due process, the combination of the interrogation tactics utilized to elicit the confession may be as offensive as the use of any one of the *per se* unconstitutional methods. *Culombe v. Connecticut*, 367 U.S. at 622-630. This Court has indicated that such confessions should likewise be excluded as a matter of law; regardless of whether the declarant's will was in fact overborne. *Id.*[16]

None of the aspects of the interrogation upon which petitioner focuses involved a *per se* violation of due process. With respect to

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[15] In *Culombe v. Connecticut*, 367 U.S. 568 (1961), this Court provided a comprehensive list of cases which featured such tactics. Specifically, this Court cited "cases involving physical brutality, threats of physical brutality, and such convincingly terror-arousing, and otherwise unexplainable, incidents of interrogation as the sudden removal of prisoners from jail at night for questioning in secluded places, the shuttling of prisoners from jail to jail, at distances from their homes, for questioning, [and] the keeping of prisoners unclothed or standing on their feet for long periods during questioning." *Id.* at 622-623 (citations omitted). This Court also cited cases involving prolonged deprivation of food and sleep, the use of drugs, the threat of mob action, and the use of "grueling, intensely unrelaxing questioning over protracted periods." *Id.* (citations omitted).

[16] This Court in *Culombe v. Connecticut*, 367 U.S. 568 (1961), determined that the confession challenged in that case fell into this second category of illegality. In so ruling, this Court ignored whether Culombe's will had in fact been overborne and concentrated its efforts on comparing his interrogation with the circumstances of prior cases in which confessions were found to be involuntary *per se*. *Id.* at 627-635. Significantly, the declarant in *Culombe* had a mental age of nine. Also, he was questioned repeatedly, albeit intermittently, for five days; the police used his wife and 13 year-old daughter in an effort to make him confess, and he was not advised of his rights. *Id.* This Court concluded that these interrogation methods rendered the confession unconstitutional as a matter of law. *Id.*

petitioner's contention that Detective Boyce lied to him, respondents deny that Boyce lied about crucial facts in order to induce petitioner to confess. However, had Boyce in fact done so, respondents note that this Court has explicitly rejected the notion that misrepresentation of evidence or the law constitutes such psychological coercion as to constitute a *per se* violation of law. *Frazier v. Cupp*, 394 U.S. 731, 739 (1969); *Stein v. New York*, 346 U.S. 156 (1953). Although the courts do not condone deception, they have refused to find confessions inadmissible as a matter of law simply because the accused has been deceived about the strength of the evidence against him. *Frazier v. Cupp*, 394 U.S. at 739.

Furthermore, respondents deny that Detective Boyce's sympathetic approach in questioning petitioner rendered petitioner's confession *per se* unconstitutional. In the absence of other compelling circumstances, a "soft-touch method" is considered morally unobjectionable. *See, e.g., State v. Keiper*, 8 Or. App. 354,____, 493 P.2d 750, 752-753 (1972). Certainly, it is the antithesis of the terror tactics which are inherently coercive. *E.g., Payne v. Arkansas*, 356 U.S. 560 (1958); *Chambers v. Florida*, *supra*. In this case, as noted by the state supreme court, Detective Boyce never led petitioner to view him as anything other than a police officer, albeit a sympathetic one, and his motivations as such were apparent to petitioner. *Compare with Leyra v. Denno*, 347 U.S. 556, 559-560 (1953) (defendant confessed to psychiatrist and close friend while unaware that they were agents of the police).

Next, respondents deny that the detective's explicit offer to do what he could to see that petitioner obtained psychiatric help (Ja21) was *per se* violative of due process. It is well-settled that the police may properly employ various methods of intellectual persuasion for the purpose of securing a statement from the accused. *See, e.g., Keiper v. Cupp*, 509 F.2d 238 (9th Cir. 1975); *United States v. Pomares*, 499 F.2d 1220 (2d Cir. 1974), *cert. denied*, 419 U.S. 1032 (1975); *United States v. Jones*, 486 F.2d 599 (5th Cir. 1973).[17]

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[17] The various advantages of cooperating which have been enumerated in interrogations found permissible by the courts include an offer of help with sexual and mental problems, *e.g., Townes v. Commonwealth*, 204 S.E.2d 269 (Va. 1974); statements that the accused, an arsonist convicted of 14 counts of manslaughter, would receive "help" if he made a clean breast of everything, *Thessen v. State*, 454 P.2d 341 (Alaska 1969), *cert. denied*, 396 U.S. 1029 (1970); statements of legal advantages, *e.g., United States v. Williams*, 479

Petitioner, however, cites *Bram v. United States*, 168 U.S. 532, 542 (1897), and cases relying on *Bram*, to argue that a confession is not voluntary if "obtained by any direct or implied promises, however slight." Respondents observe, however, that this language in *Bram* has never been applied with "the wooden literalness" urged upon this Court by petitioner.[18] *See United States v. Ferrara*, 377 F.2d 16, 17 (2d Cir. 1967), *cert. denied*, 389 U.S. 908 (1967). Rather, the courts have inquired instead "whether the alleged inducements . . . were of such a nature which necessarily overcame [the] defendant's ability to make a voluntary decision." *Fernandez-*

[17] cont'd

F.2d 1138 (4th Cir. 1973), *cert. denied*, 414 U.S. 1025 (1973); *State v. Boucher*, 13 Or. App. 339, 509 P.2d 1228 (1973) (petitioner was informed that his confederates in a robbery had since committed a murder and that he might avoid implication in the murder by confessing to the robbery), and psychologically oriented exhortations stressing the moral advantages of confessing, *e.g.*, *State v. Rollwage*, 21 Or. App. 48, 533 P.2d 831 (1975) (defendant urged to alleviate the pressures he was under, because he would feel better if he confessed). In holding that such tactics are not psychologically coercive or based upon improper inducements, the courts have noted that such advantages do in fact flow from cooperation with the police. Urging the defendant in this manner does not dilute the warnings of constitutional rights which the defendant has received and waived, and therefore, does not constitute overreaching police conduct. *United States v. Williams*, 479 F.2d at 1140. In light of this case law, it is clear that the methods of persuasion employed by Detective Boyce, including the allusions to the availability of psychiatric help and the detective's indication that he would "do all I can with the psychiatrist and everything" if petitioner confessed, were not unconstitutionally coercive. Indeed, they were entirely proper.

[18] This Court itself has recognized that the *Bram* language is an overstatement. For example, in *Brady v. United States*, 397 U.S. 742 (1970), this Court, in commenting upon the facts of *Bram*, in which the defendant had been interrogated in a foreign country, without benefit of counsel and in the nude, stated: *"In such circumstances,* even a mild promise of leniency was deemed sufficient to bar the confession because defendants *at such times* are too sensitive to inducement. . . ." 397 U.S. at 754 (emphasis supplied).

Subsequently, in *Santobello v. New York*, 404 U.S. 257 (1971), this Court placed its imprimatur upon plea bargaining and stressed the current importance of that practice to the nation's criminal justice systems. Obviously, this Court would not have countenanced plea agreements if it had deemed plea bargained guilty pleas and admissions connected therewith involuntary *per se*. Yet such pleas and admissions would be *per se* involuntary if the *Bram* language were accorded its literal meaning. Accordingly, it must be concluded that this Court does not strictly adhere to this language.

Delgado v. United States, 368 F.2d 34, 36 (9th Cir. 1966). *Accord, United States v. Pomares*, 499 F.2d at 1222; *United States v. Glasgow*, 451 F.2d 557, 558 (9th Cir. 1971); *United States v. Frazier*, 434 F.2d 994, 995-996 (5th Cir. 1970). The pressure created by a promise or other inducement to confess is measured no differently than the pressure produced by any other method of police persuasion. Thus, the Fifth Amendment does not condemn all promise-induced confessions, only those which are *compelled* by promises of leniency.[19]

Finally, respondents submit that even when examined together, petitioner's claims do not establish a violation of due process. Thus, the state courts properly assessed *the effect* the interrogation had on petitioner's ability to make a reasoned decision to confess. The state courts' conclusion in this regard is a factual finding entitled to deference.

In sum, it is clear that Boyce's minor mistake as to the existence of certain evidence, Boyce's expressions of sympathy and concern for petitioner's well-being, and Boyce's implied promise to secure psychiatric assistance for petitioner, did not render the interrogation process unconstitutional as a matter of law irrespective of whether petitioner's will was overborne. The determination of the New Jersey state courts, and in turn the lower federal courts, that the interrogation techniques employed by the police were not *per se* unconstitutional was thus correct and should be affirmed by this Court.

B. The State Courts' Fact-Findings Are Fairly Supported By The Record.

After reviewing petitioner's taped statements and the testimony given at the *Miranda* hearing, the New Jersey state courts concluded that under the totality of the circumstances petitioner's

[19] As the Third Circuit correctly observed, claims that a confession was induced by false promises or misrepresentations must be examined by looking at the effect these tactics had on the petitioner. *Miller v. Fenton*, 741 F.2d 1456, 1467 (3d Cir. 1984). In other words, these tactics are not unconstitutional *per se* but are unconstitutional only if they compelled a suspect to confess. *See Hutto v. Ross*, 429 U.S. 28, 30 (1976) (while existence of plea bargain may have entered into suspect's decision to confess, plea bargain did not require confession; therefore confession was not the result of promises). Respondents submit that petitioner was not "tricked" or coerced into confessing by false promises. See Subpoints IIB and IIC *infra*.

will was not overborne. *State v. Miller*, 76 N.J. 392, 388 A.2d 218 (1978). In reaching this conclusion the New Jersey Supreme Court found that:

> Miller was a man of reasonable intelligence who had experience with and understood the workings of the criminal justice system; that Miller's distress during the interview was a product of his realization of what he had done, not of coercive pressure by Boyce; that Miller was not deceived into believing that Boyce was anything other than a police officer investigating a serious crime for which Miller was the prime suspect; and, that Miller was well aware that, if he confessed, he would be handled through the criminal justice system. The court then concluded, on the basis of these findings, that Miller's confession was the product of his free will, rather than psychological coercion. [*Miller v. Fenton*, 741 F.2d at 1466, citing *State v. Miller*, 76 N.J. at 404, 388 A.2d at 224].

These are the findings that petitioner is challenging.[20]

The Third Circuit determined that these findings were fairly supported by the record. *Id.* at 1466. The dissent, in the Third Circuit, disagreed. *Id.* at 1468-1470. The dissent, upon which petitioner relies, argues that the state courts' findings are contradicted by the police officers' dissembling about the strength of the evidence and the time of death of the victim, the officer's implied promises that petitioner would receive psychiatric help rather than punishment, and petitioner's collapse after the interrogation ceased. On the contrary, these facts do not demonstrate that the state courts' fact-finding was clearly erroneous.

The record repudiates any suggestion that the detective lied about crucial facts in order to induce petitioner to confess. For example, petitioner claims that Boyce falsely asserted that petitioner had been identified as the individual who drove to the Margolin residence and

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20 Even if this Court were to follow petitioner's suggestion and give different weight to these facts, the facts would lead to the conclusion reached by the state courts. It is clear, therefore, that petitioner is seeking readjudication of these facts in their entirety.

reported the missing heifer. (Pb4). In fact, the victim's brothers testified that the stranger's automobile was dusty, white, had two severe dents on the right side and had its trunk tied shut. (T167-2 to 11; T180-12 to 18). This unique description, which fit petitioner's automobile, was indeed incriminating. (Ja10 to 11). Additionally, the State did present testimony that the stranger's clothes and physical appearance were similar to petitioner's work clothes and appearance. (T87-1 to 6; T169-17 to 170-2).

In addition, the fact that the detective indicated during the interview that the victim had died after, rather than prior to, discovery by the authorities would appear to have no potential for overbearing petitioner's will.[21] Petitioner was clearly informed prior to giving his confession that Deborah Margolin was dead. (Ja4; T96-15 to 23). Petitioner unquestionably realized that he was facing a murder charge. Similarly, petitioner cannot demonstrate that the unverifiable statement that blood had been found on the steps of his house led him to confess.[22] The bloodstains in petitioner's vehicle and a witness' observation of the vehicle at the Margolin farm immediately prior to the murder constituted the most damaging evidence against petitioner. Thus, petitioner cannot establish that the state courts' findings that these minor inaccuracies had no effect on petitioner's decision to confess are unwarranted.

Similarly, the state courts rejected petitioner's allegation that he was deceived into confessing by promises of psychiatric help. The following exchange in the record graphically illustrates that petitioner was fully aware that Officer Boyce's purpose in questioning him was to obtain evidence:

> [BOYCE] Honest, Frank? It's got to come out. You can't leave it in. It's hard for you, I realize that, how

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21 In light of the nature and severity of the victim's wounds it is improbable that petitioner believed that she was still alive. Indeed, petitioner's reaction to this assertion -- which was to demand that he be taken to the hospital for identification -- displays his awareness that the police were testing him.

22 This interview took place only a few hours after the discovery of the body. The record contains no evidence that Detective Boyce fabricated this statement. It is probable that Boyce was relating a preliminary suspicion which was later revealed to be inaccurate or unverifiable.

> hard it is, how difficult it is, I realize that, but you've got to help yourself before anybody else can help you. And we're going to see to it that you can get the proper help. This is our job, Frank. This is our job. This is what I want to do.
>
> [PETITIONER] By sending me back down there [to prison]. [Ja26].

And shortly thereafter:

> [PETITIONER] Yea, you, you say this now, but this thing goes to court and everything and you . . .[Ja27].

Petitioner's statements support the state courts' conclusion that he did not confess because of a mistaken belief that he would not be prosecuted for the murder.

Petitioner also cannot support his assertion that his distraught demeanor during the interview demonstrates that he was incapable of making a reasoned decision to confess. Petitioner was lucid, coherent and rational throughout the interview. He at times responded to the detective in a cynical, independent and argumentative manner. He weighed the evidence against him, fabricated a story to conform to this evidence without inculpating himself, and confessed when he recognized that he had failed to extricate himself from the consequences of his crime. As the state supreme court found, his actions are clearly consistent with those of a rational intellect and free will.

Although petitioner does note at two points in the interview that he is "feeling bad," (Ja16; Ja22), it is clear that these remarks reflect petitioner's feelings of guilt and remorse for his crime, and do not stem from any physical problems or from anything done to him by the police officers.[23] For example, near the end of the interview, the following colloquy occurs:

> [BOYCE] Are you, do you feel what I feel right now?
>
> [PETITIONER] I feel pretty bad. [Ja22].

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23 Petitioner points to isolated out-of-context remarks from the August 14 statement to assert that he was ill at the time he was questioned. (See Pb44 to 45). Respondents submit that these remarks, when viewed in context, indicate that petitioner was referring to his feelings of guilt and remorse for his heinous offense rather than any physical problem.

> This remark, made after Boyce described the victim's death, makes it clear that petitioner was referring to feelings of sympathy for the victim.

Finally, the fact that petitioner apparently slipped into a state of shock when the interrogation was terminated does not demonstrate that his will was overborne. The dissent's focus on this incident as proof that the police conduct was coercive ignores the contribution of other factors of more significance to petitioner's emotional state. Petitioner committed a brutal murder only hours earlier and had repressed the horror of his deed throughout the day. Petitioner refused to admit the sexual aspects of the offense and later claimed that he was unable to recall confessing to the crime. The state supreme court found that petitioner's collapse was in fact caused by the culmination of the realization of the enormity of what he had done and the effect it would have on his father. *State v. Miller*, 76 N.J. at 464, 388 A.2d at 224.

Courts have recognized that a defendant's agitated emotional state is frequently an outgrowth of the tension inherent in any interrogation and the defendant's own consciousness of wrongdoing and fear of its consequences. *See, e.g., Keiper v. Cupp, supra.* Clearly, the internal psychological pressures present in the instant case which led to petitioner's state of shock cannot be attributed to pressures created by the police.

This review of the claims made by the dissent in the Third Circuit reveals that the dissenting judge was seeking merely to substitute his judgment for the judgment of the state court fact-finders. The dissent points to nothing in the record which was not considered by the state courts when making their findings. Moreover, none of the evidence relied on by the dissent is inconsistent with the state courts' findings. Plainly, the dissent simply disagrees with the state courts' findings. For example, without citing to any factors not considered by the state courts or without otherwise explaining the basis for its action, the dissent ignores the state court finding that petitioner was a man of reasonable intelligence and states that petitioner had an "unstable childlike mind." *Miller v. Fenton*, 741 F.2d at 1470. Both 28 U.S.C. § 2254(d) (8) and principles of federalism preclude any such unsupported refusal to grant deference to state court findings. *See Sumner v. Mata*, 449 U.S. at 552. Moreover, they certainly

prohibit the type of wholesale substitution of judgment by the federal court which is apparently advocated by the dissent.

In sum, petitioner has failed to demonstrate that the factual findings made by the state courts were not fairly supported in the record. This Court, therefore, should affirm both the Third Circuit's ruling applying the presumption of correctness and its holding that petitioner failed to demonstrate that his confession was involuntary.

C. Plenary Review Of The Record Demonstrates That Petitioner's Confession Was Voluntary.

Should this Court determine that *de novo* fact-finding is warranted, respondents submit that the record demonstrates that petitioner voluntarily confessed to the murder of Deborah Margolin. When the taped interview commenced, it was conducted by a single officer, Detective Charles Boyce, who quietly, calmly and matter-of-factly proceeded to inquire about petitioner's activities that day and his knowledge of the murder.[24] (Ja6 to 37). The 58 minute interview (Ja4, Ja38) was remarkably brief in comparison with other confession cases. *See, e.g., Ashcraft v. Tennessee, supra.*

Petitioner was advised of his constitutional rights at the start of the interview. (Ja5 to 7).[25] Petitioner explicitly stated that he was willing to talk with Detective Boyce without having an attorney present and signed a waiver of rights form. (Ja6 to 7). Such a written waiver is generally accorded great weight in finding that a defendant knowingly, voluntarily and intelligently waived his right to remain silent. *Frazier v. Cupp*, 394 U.S. 731, 739 (1969); *Culombe v. Connecticut*, 367 U.S. at 610. In light of petitioner's consistent willingness to talk to the detective, and his written waiver, it was

[24] The connotations which might be associated with an interrogation in the early morning hours are inapposite here, since the interview took place approximately two hours after petitioner would normally have completed his shift at the plastics factory. (T100-20 to 101-19).

[25] Respondents note that petitioner has made no showing that his emotional problems left him incapable of voluntarily waiving his rights. His intelligent, reasoned responses to the officer's questions demonstrate that his education and intelligence were sufficient to enable him to make a reasoned decision regarding waiver. Petitioner's inability to control his urges to commit violent acts upon young women has no bearing on his ability to comprehend the significance of making a statement.

appropriate for Detective Boyce to attempt to persuade him to confess. *Oregon v. Bradshaw*, 462 U.S. 1039 (1983).

The record also demonstrates that petitioner had a working understanding of his constitutional rights, including the knowledge that he could terminate the questioning at any time. *See State v. Miller*, 76 N.J. at 397, 388 A.2d at 220. After reading petitioner the *Miranda* warnings, Detective Boyce questioned him:

> [BOYCE] Are you willing to talk to us without having an attorney? In reference . . .
>
> [PETITIONER] Yes.
>
> [BOYCE] . . . to the, what we have talked about?
>
> [PETITIONER] Yes.
>
> [BOYCE] Okay, fine.
>
> [PETITIONER] But, at any time though, I can, uh, say no, right?, I mean, you know . . .
>
> [BOYCE] Yes, Frank, let me, let me go over that again.
>
> [PETITIONER] Yeah, I understand that, that . . .
>
> [BOYCE] You understand your rights, Frank?
>
> [PETITIONER] Yeah.
>
> [BOYCE] Okay. (cough) You may stop at anytime during this interrogation. . . .
>
> [PETITIONER] Yeah.
>
> [BOYCE] . . . and request to remain silent and we will honor your request.
>
> [PETITIONER] Yes.
>
> [BOYCE] Okay?
>
> [PETITIONER] Yeah. [Ja6].

This Court has identified the defendant's right to cut off questioning as a "critical safeguard" which counteracts the coercive pressures of the custodial setting. *Michigan v. Mosley*, 423 U.S. 96, 103-104 (1975); *Miranda v. Arizona*, 384 U.S. 436, 474 (1966). The fact that petitioner was thus armed with this critical safeguard weighs heavily in favor of a finding that his confession was voluntary.

Compare Keiper v. Cupp, 509 F.2d 238, 241 (9th Cir. 1975) (defendant who was apprised of his rights was capable of evaluating request that he take a polygraph examination) *with Greenwald v. Wisconsin*, 390 U.S. 519, 520 (1968) (the failure to initially apprise defendant of his rights weighed heavily in the determination that his confession was involuntary).

It is significant that petitioner chose not to exercise this right during questioning. At no time during the 58 minute interview did petitioner express any unwillingness to answer questions or any desire that questioning cease.

The remainder of the interrogation can be summarized as follows. Initially, Detective Boyce reviewed petitioner's account of his day. Petitioner was cooperative, giving thoughtful responses to each question. It became apparent that petitioner was unable to account for a time period of 30 to 40 minutes which coincides with the murder and during which petitioner was admittedly in the vicinity of the crime. (Ja7 to 10). When Detective Boyce stated, "Okay, now, this is a problem," petitioner replied, "I realize this." (Ja10).

Detective Boyce then apprised petitioner of the evidence implicating him. (Ja10 to 13). After discussing the unique characteristics of petitioner's automobile and informing petitioner that the description of the automobile observed at the victim's home fit his automobile, Detective Boyce asked petitioner:

> [BOYCE] Now, what would your conclusion be under those circumstances, if someone told you that?
>
> [PETITIONER] I'd probably, uh, have the same conclusion you got.
>
> [BOYCE] Which is what?
>
> [PETITIONER] That I'm the guy that, that did this. [Ja13].

Throughout the remainder of the interview Detective Boyce expressed sympathy for petitioner's problem and concern for his well-being and his belief that the petitioner was "sick" and needed treatment. Petitioner remained well aware that Boyce's interest in him emanated solely from Boyce's role as a police officer and expressed no doubt that his statement would be used against him and that he would go to prison if he admitted to the crime. (Ja16; Ja26

to 28). Finally, the detective asked petitioner to recount what had happened, again exhorting him to tell the truth. (Ja16; Ja26 to 29). After petitioner began, Detective Boyce said, "You want it to happen," and petitioner replied, "Yes." (Ja30). Petitioner then admitted that he had cut the victim in the throat with his penknife. (Ja30). He went on to supply the essential facts of the killing, although he denied any sexual aspects of the brutal assault on Deborah Margolin. (Ja30 to 38). At the end of the interview, petitioner confirmed his willingness to aid in the preparation of a formal statement. (Ja38).

The greater part of this interrogation was devoted to confronting petitioner with the evidence inculpating him and exhorting him to tell the truth. This evidence included a witness' description of an automobile matching petitioner's unique vehicle as the automobile driven by the stranger who approached the victim shortly before her disappearance, and a witness' description of the stranger which fit that of petitioner. Additionally, bloodstains matching the victim's blood type were found in the front seat of petitioner's vehicle; petitioner was seen in the area at the time the offense was committed, and he could not account for his whereabouts at the time of the offense. Thus, there was substantial evidence linking petitioner to the crime and that fact was related to him by the police officer.

There is no doubt that confronting a defendant with the evidence against him is an accepted method of prompting a confession. Furthermore, petitioner's colloquy with Boyce makes it clear that he was never under the illusion that Boyce was anything other than a police officer attempting to elicit evidence against him which would send him to prison. (Ja16; Ja26 to 28).

Any implied promise of psychiatric help was clearly within the context of an anticipated criminal prosecution. *State v. Miller*, 76 N.J. at 404, 388 A.2d at 224. It was not unreasonable for Detective Boyce to assume that petitioner would receive psychiatric treatment in connection with his incarceration for this murder and to pass this assumption on to petitioner during questioning.

It is clear that under the totality of the circumstances, regardless of Boyce's minor mistakes as to certain insignificant items of evidence, and his expressions of sympathy and concern and belief that the crime was committed by an emotionally disturbed individual, petitioner's

confession was a product of his free and rational decision to cooperate.

In sum, petitioner at all times knew that his confession would be used against him and that a prison sentence was the likely consequence of his admission to committing the murder. Petitioner's confession, coming on the heels of his realization of the extent and nature of the evidence against him and his expressions of guilt and remorse, was the product of his own desire to admit his crime rather than a product of police pressure which overbore his will.

CONCLUSION

For the foregoing reasons, respondents urge this Court to rule that the Third Circuit properly applied the presumption of correctness in 28 U.S.C. § 2254(d) (8) to the New Jersey courts' finding that petitioner's confession was a product of his rational intellect and an exercise of his free will and, therefore, to affirm the decision of the United States Court of Appeals for the Third Circuit denying petitioner's petition for a writ of habeas corpus.

Respectfully submitted,

IRWIN I. KIMMELMAN
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR RESPONDENTS

BY: s/ ANNE C. PASKOW

Anne C. Paskow
Deputy Attorney General
Attorney of Record

Anne C. Paskow
Allan J. Nodes
Debra L. Stone
Linda L. Yoder
Gilbert G. Miller

DEPUTY ATTORNEYS GENERAL
DIVISION OF CRIMINAL JUSTICE

OF COUNSEL AND ON THE BRIEF

DATED: July 17, 1985

REPLY

BRIEF

No. 84-5786

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

FRANK M. MILLER, JR., Petitioner,
v.
PETER J. FENTON, Superintendent,
Rahway State Prison, and
IRWIN I. KIMMELMAN, Attorney General,
State of New Jersey, Respondents

On Writ of Certiorari To The United States Court of Appeals For The Third Circuit

---

REPLY BRIEF OF PETITIONER

THOMAS S. SMITH
Acting Public Defender of New Jersey
PAUL MARTIN KLEIN*
Assistant Deputy Public Defender
CLAUDIA VAN WYK
Assistant Deputy Public Defender
Office of the Public Defender
Appellate Section
20 Evergreen Place
East Orange, New Jersey 07018
(201) 266-1800
Counsel for Petitioner

*Counsel of Record

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 84-5786

FRANK M. MILLER, JR., Petitioner,
v.
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IRWIN I. KIMMELMAN, Attorney General,
State of New Jersey, Respondents

On Writ of Certiorari To The United
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The Third Circuit

REPLY BRIEF OF PETITIONER

ARGUMENT

Respondents' attempt to construct a justification for the holding below in fact piles misconstruction upon misconstruction: their distortion of the constitutionally required standard for voluntariness underlies further distortions of the nature of appellate review and of petitioner's argument.

First, respondents refer in both points of their brief to a novel two-prong test for voluntariness: (1) whether individual police

methods were unconstitutional "in and of themselves" (Rb 21),* or "as a matter of law" (Rb 26, 27), or "per se" (Rb 12, 28), and (2) whether "in the totality of the circumstances," (Rb 21) or "in fact" (Rb 26), the defendant's will was overborne. Assuming that these formulations of the test are equivalent, its purpose seems to be to enable respondents to attack each factor in petitioner's voluntariness argument individually (Rb 28-31).

Unfortunately, petitioner cites to no authority for the first prong of the test. Indeed, this Court has repeatedly held that the only test for voluntariness is indivisible: whether under the totality of the circumstances the defendant's "will has been overborne and his capacity for self-determination critically impaired." Schneckloth v. Bustamonte, 412 U.S. 216, 226-27 (1973), citing Culombe v. Connecticut, 367 U.S. 568, 602 (1961).

> The significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances.

Schneckloth, 412 U.S. at 226. Respondents' first distortion thus artifically isolates the elements of the totality equation. The second improperly enables respondents to treat those elements as factual. Respondents' brief carries the implicit premise that an appellate court reviewing a voluntariness claim – or any legal claim – can perform only two functions: finding facts and declaring the legal standard (Rb 12, par. 2; 23 and n. 11; 24). Respondents ignore a critical third step: application of the legal standard to the facts. See Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 234, 235-37 (1985). Since respondents' universe contains only fact finding and law declaration, whenever a reviewing court does more than state an abstract legal standard it must be finding facts. Thus they construe the question in a

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* "Rb" refers to respondent's brief, "Pb" to petitioner's main brief.

voluntariness claim as a factual investigation of "the effect the circumstances surrounding the interview had on petitioner's decision to confess" (Rb 22).*

Respondents do not deny the existence of mixed questions of law and fact, but they apparently treat them as a species of law declaration:

> Mixed questions of law and fact require independent review on habeas because the federal court must ensure that the correct legal standard was applied. This Court's decisions indicate that after a federal court has determined that the state court has applied the correct legal standard the state court's fact-finding are [sic] entitled to deference.

(Rb 23 n. 11). This formulation does not acknowledge that a reviewing court must decide not only whether the lower court knew what the correct standard was, but also whether it applied that abstract standard correctly.

Finally, respondents distort petitioner's argument. Since all legal issues assertedly reduce to law declaration or fact identification, they claim that petitioner argues that some facts – "objective" facts – are exempt from the presumption of correctness in 28 U.S.C. §2254(d) (Rb 18). Nowhere on the cited page, Pb 17, does petitioner tie the term "historical" facts to the distinction between "objective" and "subjective.".

---

* Respondents accurately quote language in Schneckloth, 412 U.S. 216, 227, which refers to voluntariness as a "question of fact." However, since the presumption of correctness in §2254(d) was not in issue in Schneckloth, these statements are dicta. In any case, the way Schneckloth elaborates on the voluntariness determination makes clear that it requires the application of a general standard to a wide range of facts. Morever, many of the opinion's references to facts are figures of speech rather than technical statements. Id. at 223 (whether "in fact" confessions were voluntarily given), 248 (consent was "in fact" voluntarily given).

Petitioner is not arguing the "subjective" facts are exempt from the presumption. He is not arguing that any facts are exempt from presumption. He is arguing, however, that mixed questions of law and fact are exempt (Pb 17), that state of mind determinations require too many implicit inferences to be purely factual (Pb 12), and that in any case the voluntariness inquiry involves more than a state of mind determination (Pb 10-12). Reviewing courts must evaluate the totality of the circumstances, not just the defendant's mental state:

> While the state of the accused's mind, and the failure of the police to advise the accused of his rights, were certainly factors to be evaluated in assessing the "voluntariness" of an accused's responses, they were not in and of themselves determinative.

Schneckloth, 412 U.S. at 227 (emphasis added).*

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* Respondents claim at Rb 13 n. 4 that petitioner's summary of the holdings of the various Courts of Appeals, at Pb 26 n. 8, "misconstrues the import of those cases." Petitioner stands by his analysis. It begs the question to list cases which apply the presumption of correctness "to the factual portions of the voluntariness inquiry" since no one disputes that the presumption applies to facts. For example, one case that respondents cite for that proposition, Fowler v. Jago, 683 F. 2d 983, 992 (6th Cir. 1982), explicitly states that "the ultimate question as to the constitutional admissibility of the confession in this case is a mixed question of fact and law that is not governed by §2254." Finally, respondents could not find any decision by the Court of Appeals for the 10th Circuit addressing this issue. Castleberry v. Alford, 666 F. 2d 1338, 1342 (10th Cir. 1982), discussed in petitioner's petition for writ of certiorari at 12 and 16, holds that voluntariness can be a mixed, purely factual, or purely legal question, but that in the case at bar it is factual. Petitioner apologizes for omitting the case from his main brief.

CONCLUSION

Respondents distort the constitutionally required totality test, the nature of appellate review, and petitioner's argument. Since this threefold misconstruction cannot stand, and for the reasons in Points I and II of petitioner's main brief, this Court should now reverse.

Respectfully submitted,

THOMAS S. SMITH
Acting Public Defender of New Jersey

BY: _____
PAUL M. KLEIN*
Assistant Deputy Public Defender

CLAUDIA VAN WYK
Assistant Deputy Public Defender

Office of the Public Defender
Appellate Section
20 Evergreen Place
East Orange, New Jersey 07018
201-266-1800

Counsel for Petitioner
*Counsel of Record

AMICUS CURIAE

BRIEF

No. 84-5786

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK M. MILLER, JR.,

Petitioner,

v.

PETER J. FENTON, Superintendent, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, *AMICI CURIAE*

LARRY W. YACKLE
Boston University
School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-4688

CHARLES S. SIMS
Counsel of Record
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Counsel for *Amici Curiae*

No. 84-5786

IN THE
SUPREME COURT OF THE UNITED STATES

Frank M. Miller, Jr.,
Petitioner,

v.

Peter J. Fenton, Superintendent, et al.,
Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, AMICI CURIAE

The American Civil Liberties Union and the ACLU of New Jersey respectfully move for leave to file the within brief amici curiae. The petitioner has consented to the filing of this brief; the respondents, while not opposing it, have declined to consent.

The American Civil Liberties Union is a nationwide, nonpartisan organization of more

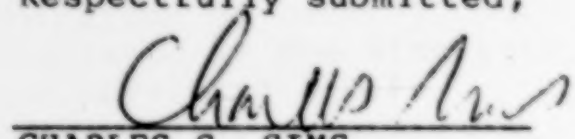
than 250,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU of New Jersey is one of its state affiliates.

The ACLU has long worked to defend the rights of criminal defendants and has filed many briefs, as counsel for a litigant or as amicus curiae, in cases requiring the construction of federal statutes and the interpretation of federal constitutional provisions related to criminal cases. Although this case presents a substantive constitutional questions regarding the voluntariness of a confession, we file this brief primarily to address a statutory issue with extremely important structural consequences. The judgment below will, if affirmed, result in the effective displacement of the authority to decide the constitutional voluntariness of confessions from federal habeas courts, where as this

Court has repeatedly recognized Congress has placed it, to state courts. As we show in this brief, the legislative history of the statutes governing federal habeas corpus conclusively precludes that judgment, which is in any event supported by neither precedent nor sound policy.

Accordingly, amici move for leave the attached brief amici curiae.

Respectfully submitted,



CHARLES S. SIMS
Counsel of Record
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
212/944-9800

June 1, 1985

ISSUE PRESENTED

Whether the Court of Appeals erred in treating the New Jersey Supreme Court's conclusion that the petitioner's confession was voluntary as a finding of historical fact presumed to be correct pursuant to 28 U.S.C. § 2254(d) (1982).

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STATEMENT OF THE CASE

This Court granted certiorari to review the Court of Appeals' denial of habeas corpus relief to the petitioner, Frank M. Miller, a New Jersey prisoner, who complains that a statement obtained from him involuntarily was unconstitutionally admitted into evidence at his trial in state court. The petitioner contends that his statement was rendered involuntary by a police interrogator's use of deceit, false promises, and extensive psychological pressure. The state trial court admitted the statement over the petitioner's timely objection. The Appellate Division of the New Jersey Superior Court unanimously reversed the conviction on the ground that the historical facts established, as a matter of law, that the statement was involuntary. The New Jersey Supreme Court

(by a 4-3 vote) reversed yet again on the ground that the historical facts did not establish, as a matter of law, that the statement was involuntary.

The United States District Court for the District of New Jersey dismissed the petitioner's application for habeas relief without a hearing, but issued a certificate of probable cause permitting appeal to the Third Circuit Court of Appeals. Treating the New Jersey Supreme Court's determination of voluntariness as a finding of historical fact, rather than a conclusion of law, the Court of Appeals invoked 28 U.S.C. § 2254(d)(1982), which governs the effect of state court findings of historical fact in federal habeas proceedings. The Court of Appeals asked only whether the adjudicatory machinery in state court was flawed in one of the ways identified by the statute and

whether the "finding" of voluntariness was supported by the record. Concluding that the state court process was not flawed and that the record was adequate to support the "finding," the Court of Appeals affirmed the District Court's action.

SUMMARY OF ARGUMENT

The task at hand is to construe the statutory scheme which fixes the burden and standard of proof in federal habeas corpus proceedings in which a state prisoner challenges the voluntariness of a confession. As a general matter, the petitioner in habeas bears the burden of proving an entitlement to relief by a preponderance of the evidence. Pursuant to § 2254(d), however, the petitioner's burden may be heightened with respect to issues of historical fact. If the respondent proves the existence of a state court finding of fact, made in a procedurally acceptable manner and supported by the record, the finding is presumed to be correct. The petitioner, then, must assume the burden of showing by convincing evidence that the

factual finding is erroneous. The applicability of the special framework established by § 2254(d) turns on the familiar distinction between questions of fact on the one hand, and questions of law, or mixed questions of law and fact, on the other.

The definitional distinction between fact and law is used in this and other contexts as a surrogate for forum-allocation. The characterization of an issue as one of fact results in deference to the state courts, whose supportable findings enjoy the statutory presumption; the characterization of an issue as a legal or mixed question subjects it to the independent judgment of the federal courts. The tendency in the lower courts to grapple with the fact-law distinction in the abstract, without reference to the forum-allocation issue which turns upon it, has produced wildly

inconsistent decisions regarding a range of recurring questions. This Court has taken time to resolve some conflicts. E.g., Cuyler v. Sullivan, 446 U.S. 335 (1984)(making it clear that the effectiveness of counsel is a mixed issue); Brewer v. Williams, 430 U.S. 387 (1977)(making it clear that the question of waiver is also mixed). Now the Court has the opportunity to correct the Court of Appeals' surprising misconception that the voluntariness of a confession is a matter of historical fact subject to § 2254(d).

At stake is nothing less than the conventional understanding of the fact-law distinction in confession cases. In the typical case, it is necessary, first, to determine the historical facts--to engage in a "case-specific inquiry into what happened here." Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 235

(1985). Factual issues are questions about historical truth. Who was present in the interrogation room? What were the physical conditions? Who said what, or did what, to whom? The litigants occasionally dispute the historical facts, and when they do the trier of fact must take evidence, appraise witnesses' demeanor, and make credibility choices. The judge who sees the witnesses is in a good position to resolve conflicts in testimony. For that reason, Congress has provided in § 2254(d) that state court findings of historical fact, often involving credibility choices, are entitled to some deference. If they were made in a reliable manner and are supported by the record, they are accorded a presumption of correctness that can be overcome only by convincing evidence.

After the historical facts have been found, however, it is necessary to apply to

those facts the applicable legal standard--voluntariness. The project at this level is no longer to identify historical truth, but to decide the legal significance of historical events. Congress has provided that the federal habeas courts are to make their own determinations of voluntariness.[1]

Our argument is in three parts. First, the Court of Appeals' erroneous characterization of the voluntariness of

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[1] There is a middle ground, best identified by illustration. The litigants may dispute whether the temperature in the interrogation room was 70 or 90 degrees, and if the state court chooses to believe that the temperature was 90 degrees, that determination is one of historical fact subject to § 2254(d). If the state court goes on to say that it was "hot" in the room and that the suspect was "uncomfortable," the court is arguably no longer finding historical facts but is, instead, drawing inferences from the fact that the temperature in the room was 90 degrees. We think, however, that such inferences are nonetheless subject to § 2254(d). Congress' plan in this statute is not to confine the definition of historical fact to matters devoid of

a confession as a question of historical fact frustrates the federal adjudication of federal claims contemplated by the statutory scheme governing habeas corpus. It extends the statutory presumption beyond state court findings of historical fact to the legal or mixed issues that Congress intends for independent federal consideration. Second, the error undercuts well-established forum-allocation choices in other contexts in which the fact-law distinction is employed as a surrogate.

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judgment. If it were, the search for genuine facts would be endless. It is possible to look behind even testimony regarding room temperature and to insist that witnesses can only report what they understood the wall thermostat to read. The "fact" of the room's temperature is itself only an inference from a more elemental "fact"--the position of the thermostat dial. Ordinary rational inferences from historical facts are themselves historical facts within the meaning of § 2254(d). When, however, state court inferences imply the application of legal standards, the issue being determined is not factual, but legal.

The incorrect identification of an issue in the habeas context threatens to complicate and embarrass the Court's work in other contexts in which such a characterization may seem apposite, but in which it is plainly unacceptable. Third, the Court of Appeals' erroneous characterization squarely conflicts with this Court's precedents. Those precedents establish that when determinations "imply the application of standards of law," they are not findings of historical fact, but conclusions of law. Pullman-Standard v. Swint, 456 U.S. 273, 286-87 n. 16 (1982) quoting Baumgartner v. United States, 322 U.S. 665, 671 (1944).

ARGUMENT

I. THE COURT OF APPEALS' CHARACTERIZATION OF THE VOLUNTARINESS OF A CONFESSION AS A QUESTION OF HISTORICAL FACT FRUSTRATES THE FEDERAL ADJUDICATION OF FEDERAL CLAIMS CONTEMPLATED BY THE STATUTORY SCHEME GOVERNING HABEAS CORPUS

A. The Precedents

This Court has recently reaffirmed its commitment to the substance of habeas, stated clearly in Brown v. Allen, 344 U.S. 443 (1953). If state prisoners meet the procedural requirements set before them, they are entitled to independent federal adjudication of their federal claims. E.g., Wainwright v. Sykes, 433 U.S. 72, 87 (1977)(stating that the "rule of Brown v. Allen is in no way changed by our holding today"). Prior state court judgments are

due the respect the federal courts pay to the judgments of courts of other jurisdictions. But, in the words of the Court in Brown, they are "not res judicata." 344 U.S. at 458.

This is not because the state courts are not good courts, or because they cannot or will not adjudicate federal claims in good faith. It is because Congress has decided that the state courts do not offer the necessary institutional setting for final determinations of federal claims. Whatever the Justices' private appraisal of Congress' judgment in this respect, no recent decision has called that judgment into question. An affirmance in this case, however, would do so. By characterizing what is plainly a legal or mixed question as one of historical fact and subjecting a determination of that issue to § 2254(d), the Court of Appeals has refused to engage

in the very independent decision-making that Congress has prescribed.

The Court of Appeals recognizes that law-declaration is not to be left to the state courts. In confession cases, the identification of voluntariness as the standard for determining admissibility is conceded by all to be a matter for independent judgment by the federal habeas courts. And if the New Jersey courts had employed some other doctrinal formulation, the Court of Appeals would not have deferred. To restrict the federal habeas courts to the superficial and mechanistic question whether the state courts invoked the proper constitutional standard is, however, wholly at odds with the habeas statutes and this Court's construction of them.

Habeas examination of confession cases would be rendered virtually inconsequential if the federal courts lacked authority to

make their own law-application decisions. Justice Frankfurter's elaboration of the habeas courts' function in Brown has long constituted conventional wisdom:

> When the record of the State court proceedings is before the court, it may appear that the issue turns on basic facts and that the facts (in the sense of a recital of external events and the credibility of their narrators) have been tried and adjudicated against the applicant. Unless a vital flaw be found in the process of ascertaining such facts in the State court, the District Judge may accept their determination in the State proceeding and deny the application. On the other hand, State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely questions that the federa is commanded to decide.
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> • • • •
>
> Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts, see Baumgartner v. United States, 322 U.S. 665, 670-671, the District Judge must exercise his own judgment on this blend of facts

> and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.
>
> For instance, the question whether established primary facts underlying a confession prove that the confession was coerced or voluntary cannot rest on the State decision....

344 U.S. at 506-507 (Frankfurter, J., concurring)(footnote omitted)(emphasis added).

Nothing in the Court of Appeals' application of § 2254(d) approximates the independent adjudication contemplated by the larger habeas framework. To be sure, the Court of Appeals examined the state record to determine whether the "finding" of voluntariness was "fairly supported." Yet that superficial appraisal fell well short of the fresh judgment the Court of Appeals should have undertaken. There is an enormous difference between perusing a

state court record for "fair support" for a "finding" already made and independent federal adjudication of a federal claim.[2] This case is here because the Court of Appeals offered the one when the other was called for.

B. Section 2254(d) and its History

In essence, the Court of Appeals reads § 2254(d) as a repudiation of Justice Frankfurter's construction of §§ 2241-2254(c). Yet nothing in § 2254(d) or its history supports any such understanding. Indeed, § 2254(d) plainly builds upon the fact-law distinction as

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2 This Court has said that "fair support" in the record is demonstrated in this context by the existence of "probative evidence" underlying the state court determination. Sumner v. Mata, ___ U.S. ___, ___ n. 6, 104 S.Ct. 453, 457 n. 6 (1983). We do not mean to adopt a position on whether this definition, mentioned in a footnote to a per curiam which prompted a lengthy dissent, captures everything that § 2254(d) means by "fair support" in the record.

conventionally understood, distinguishing clearly between state court determinations of historical fact, which may be presumed correct in some instances, and state court conclusions regarding legal or mixed questions, which are always subject to fresh judgment in the federal forum. On its face, the statute refers only to a "factual issue" which may have been determined in state court. The drafters plainly had in mind only issues of historical, basic, primary, evidentiary facts--what Justice Frankfurter called recitals of "external events."

The "facts" are critical, of course. Indeed, they may well determine the answer to the legal or mixed question at hand. In this instance, for example, it is conceded that the interrogation session lasted approximately fifty-eight minutes. This is a matter of historical fact. If the session had in "fact" lasted only

fifty-eight seconds, the petitioner's legal claim of involuntariness would be weaker than it is. If the session had lasted fifty-eight hours, his claim would be much stronger. It is vital, however, that questions of historical fact that bear on legal or mixed questions should not be confused with legal or mixed questions themselves.

Section 2254(d) was introduced in the 89th Congress as H.R. 5958. House Report No. 1892, Aug. 25, 1966, explains that the bill was drafted by the Judicial Conference of the United States as a substitute for previous bills the Conference had pressed upon Congress. The new bill amended § 2254 in various ways, including the addition of subsection (d). The limited meaning of the new subsection is stated in the House Report:

> The substitute also creates reasonable presumptions and fixes the party on whom the burden of proof, as to certain factual issues, shall rest in such proceedings without impairment of any of the substantive rights of the applicant.

House Report at 3 (emphasis added). The precise purpose of the subsection can be gleaned from an examination of its history within the Judicial Conference, from which the House Report borrowed the language quoted above. See Senate Report No. 1797, Oct. 18, 1966, quoting Report of the Committee on Habeas Corpus, September, 1965.

Beginning in the 1940's, the Judicial Conference appointed committees to study federal habeas corpus. Early bills drafted by a committee chaired by Judge John J. Parker would virtually have eliminated the federal courts' power to entertain petitions from state prisoners. See

Parker, Limiting the Abuse of Habeas Corpus, 8 F.R.D 171 (1949). None of those bills was enacted. Later, the Judicial Conference sought to amend the habeas statutes in connection with the larger effort in Congress to revise the Judicial Code. The habeas legislation accompanying the Revision in 1948 was intended, however, essentially to codify existing decisional law. This Court accepted it in that way in Brown. 344 U.S. at 462. In the wake of Brown, the Parker committee was reactivated and proposed yet another bill, which would have "greatly restricted" the jurisdiction of the district courts to consider applications from state prisoners. Report of the Committee on Habeas Corpus, 33 F.R.D. 363, 367 (1963). The effect, however, would have been an increase in the flow of habeas and certiorari petitions to this Court. The Chief Justice and other members of the Court became "very

apprehensive" that the enactment of the Parker committee bill would "unduly increase the work of the Supreme Court." Id. at 371.

A new bill was then drafted and substituted for the Parker committee bill in the 86th Congress. When that bill, H.R. 6742, was circulated, the Conference of State Chief Justices and the National Association of Attorneys General voiced their opposition to some provisions and offered amendments. One in particular is relevant here. It was proposed to "make the finding of a fact of a State court conclusive in a proceeding in habeas corpus in a Federal court"--even if the state court lacked jurisdiction of the prisoner concerned or failed to accord the prisoner a full and fair hearing on the factual issue. 33 F.R.D. at 376. The Judicial Conference committee refused to agree to such an amendment. H.R. 6742 did not pass

the Senate. It was not reintroduced in the next Congress for want of sufficient support to make the effort worthwhile. In September, 1962, the committee reported to the Judicial Conference that if any habeas corpus legislation was to be enacted, it should be that embodied in the failed H.R. 6742. There being no indication that Congress was prepared to act favorably on such legislation, the committee recommended that the Conference not press forward.

The conjunction of two events prompted the committee again to become active. Representative Smith of Virginia introduced his own bill, patterned after the Parker committee bill, and this Court handed down its decisions in Fay v. Noia, 372 U.S. 391 (1963), and Townsend v. Sain, 372 U.S. 293 (1963), which, coupled with Gideon v. Wainwright, 372 U.S. 335 (1963), promised to generate many new applications for habeas relief. Once again, it was feared

that in attempting to deny the federal district courts jurisdiction in habeas corpus, Congress might swamp this Court with cases--at a time when the number of state prisoners seeking federal relief was likely to increase.

Accordingly, the committee recommended that the Judicial Conference reaffirm its commitment to the language of H.R. 6742. To appease the organizations of state authorities that had previously sought a provision respecting state factual findings, the committee offered an amendment, which ultimately became § 2254(d). The committee's introduction of that amendment is illuminating:

> If the bill is reintroduced, we feel reasonably certain an amendment with respect to the effect to be given to State court factual determinations, where the same factual issue arises in a proceeding instituted in a Federal court by an application for a writ of habeas corpus by a State court

prisoner, will be urged by the State organizations referred to above.

Of course, an amendment such as was proposed to our Committee by the representatives of such State organizations ... would be wholly incompatible with the duty of Federal courts to determine Federal constitutional questions. However, your Committee is of the opinion that a provision in the proposed statute dealing with the questions of presumption and burden of proof would be both practical and desirable.

Before reaching the text of our proposed amendment, it may be helpful to refer to certain adjudicated cases.

In Brown v. Allen ..., the court said:

> ... where there is material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the District Court may properly depend upon the state's resolution of the issue ....In other circumstances the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not res judicata.
>
> * * * *

In Blackburn v. Alabama, 361 U.S. 199, at page 205..., the court said:

After according all of the deference to the trial judge's decision which is compatible with our duty to determine constitutional questions, we are unable to escape the conclusion that Blackburn's confession can fairly be characterized only as involuntary....

and in an appended note stated:

> It is well established, of course, that although this Court will accord respect to the conclusions of the state courts in cases of this nature, we cannot escape the responsibility of scrutinizing the record ourselves.

In Townsend v. Sain..., the court said:

> ...Where the fundamental liberties of the person are claimed to have been infringed, we carefully scrutinize the state-court record....The duty of the Federal District Court on habeas is no less exacting....

33 F.R.D. at 379-380 (emphasis added). New language contained in the committee's next draft found its way into H.R. 5958 and, in turn, into § 2254(d).

This is the legislative history behind

the statute the Court must construe. It points in only one direction. While there have been many proposals over the years to restrict the federal habeas courts' authority to consider federal claims as a sequel to state court adjudication, none has won approval in Congress. Earlier proposals drafted by committees of the Judicial Conference were discarded by the Conference itself. The amendment to the habeas statutes enacted in 1966 was not intended to curtail the habeas courts' power to determine federal claims, but to appease state authorities concerned with the treatment of state court factual findings in federal proceedings. The drafters confirmed the "duty of Federal courts to determine Federal constitutional questions" and set out language from this Court's confession cases, making it plain that the drafters understood that the voluntariness of a confession is not itself

a question of historical fact, but a legal or mixed question for independent federal judgment. The House Report accompanying H.R. 5958 to the floor embraced the Judicial Conference's sentiments explicitly. The proposal was to adjust the burden of proof with respect to state findings of fact, as findings of fact were conventionally defined, and without impairing any "substantive rights" of habeas applicants.

Even if this Court were now to regret the long tradition recognizing that the voluntariness of a confession is a legal or mixed question, the Court could hardly ignore the controlling federal statute, § 2254(d), which contemplates that the federal courts will exercise independent judgment on the voluntariness issue. Indeed, even if the Court were inclined to discard Brown, Blackburn, and Townsend into the bargain, § 2254(d), founded upon those

precedents, would still mean the same. Cf. Patsy v. Bd. of Regents, 457 U.S. 496, 512-516 (1982); id at 516 (O'Connor & Rehnquist, J.J., concurring); id. at 517 (White, J., concurring); Flood v. Kuhn, 407 U.S. 258, 283-284 (1972)(refusing to reject even anomalous precedents when Congress "by positive inaction...evinces a desire not to disapprove them legislatively").

C. Federal-State Relations

The Court of Appeals' attempt to deal with confession cases through the screen of § 2254(d) cannot be passed off as an adjustment of the always sensitive relations between the state and federal courts. Indeed, the Court of Appeals' posture promises the worst of all worlds in this respect. In conventional practice and theory, state court judgments on federal claims are not reviewed in federal habeas corpus. Federal habeas courts make their own, independent judgments--giving previous

determinations in state court the respect normally accorded the judgments of courts of another jurisdiction. If friction results, or "finality" is compromised, it is not because the federal courts presume to correct state court error, but because they undertake to adjudicate independently of the state courts and occasionally reach different conclusions.

The Court of Appeals' approach to confession cases would have the federal habeas courts do precisely what they avoid under current law. The Court of Appeals would have them sit in judgment of the state courts. To begin, the Court of Appeals has it that a federal habeas court must translate a state court determination of voluntariness, plainly considered by the state court itself as a conclusion of law, into a finding of historical fact. Then, the federal court must review the adequacy of the state machinery which produced that

"finding" and, moreover, examine the state court record to decide whether the "finding" enjoys "fair support." The work of the state court is thus directly called into question, and the federal habeas court proceeds only after approving or disapproving what was done in state court. This scheme, the Court of Appeals' scheme, is the scheme which threatens friction with the state courts and the subordination of the "finality" of their judgments. State courts may well resent having what they do considered something else and then being called to account for producing what they never attempted to produce in a manner, and on a record, satisfying to the federal habeas courts.

Viewed from the perspective of the federal habeas courts, the Court of Appeals' scheme is even more troubling. There is no reason to think that the characterization of voluntariness as

factual would reduce the time and effort that must be devoted by habeas courts to confession cases. Resources still must be expended to identify state court "findings," to evaluate state court procedures, and to appraise the state court record for "fair support." It seems entirely likely that the habeas courts would be called upon to do as much or more work within the framework of § 2254(d) as they would if they were to follow convention and make their own, independent determinations of voluntariness. This without the institutional reward that ordinarily justifies the commitment of federal adjudicatory resources--serious, thorough-going adjudication that discovers meritorious claims.

It makes little sense to invoke § 2254(d) in the name of mitigating the alleged redundancy of federal habeas corpus only to require the habeas courts to

confront the state courts more directly and to expend as much or more of their own effort applying the statute to confession cases. If the federal courts are going to be recruited to service at all, and Congress has decided that they will be, let it not be to waste resources looking for reasons not to adjudicate federal constitutional claims.

The Court of Appeals' posture is the more curious inasmuch as it frustrates independent federal adjudication without promising an improvement over conventional understandings which operate, in the run of cases, to leave state court determinations of voluntariness undisturbed. Section 2254(d) plainly does apply to genuine historical facts. Treated to sound fact-finding in state court, based upon a record that solidly supports that fact-finding, the federal habeas courts can dispose of the legal or mixed question of

voluntariness efficiently, cleanly, and accurately. In so doing, they are, of course, free to take account of the state courts' determination of the same issue. There is flexibility in this, precisely the flexibility that Congress and this Court have long thought to be necessary. The Court of Appeals' position would frustrate what is now a workable system for ensuring the voluntariness of confessions by forcing a rigid statute into a phase of habeas proceedings where it was never intended to operate.[3]

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[3] Incorrect state court "findings" of voluntariness can cut in both directions. The respondent who argues in this case that a state court determination against the petitioner is subject to § 2254(d) will hardly wish to concede in the next that a judgment favorable to the prisoner is entitled to equal deference. Far better to preserve the federal courts' jurisdiction to correct errors of federal law than to foreclose federal adjudication on a quasi-jurisdictional basis. Cf. Michigan v. Long, 463 U.S. 1032 (1983).

II. THE COURT OF APPEALS' CHARACTERIZATION OF THE VOLUNTARINESS OF A CONFESSION AS A QUESTION OF HISTORICAL FACT UNDERCUTS WELL-ESTABLISHED FORUM-ALLOCATION CHOICES IN OTHER CONTEXTS

Section 2254(d) is not the only instance in which the fact-law distinction is employed as a surrogate for allocating decision-making authority. Rule 52(a) of the Federal Rules of Civil Procedure relies on the same distinction to orchestrate direct review within the federal system, and this Court has invoked it in exercising appellate review of state court judgments. See also L. Jaffe, Judicial Control of Administrative Action chs. 14-15 (1965)(treating the distinction as it is employed in administrative law). Although the consequences of characterizing an issue as one of historical fact may differ between the habeas and direct review

contexts, [4] the Court of Appeals in this case assumed, we think correctly, that the analytical content of the term "fact" does not shift as this Court moves from one line of precedents to the other. 741 F.2d 1456, 1463 n. 13. What the Court does here will have implications for its long tradition of making its own determinations of voluntariness. E.g., Mincey v. Arizona, 437 U.S. 385, 398 (1978), quoting Townsend v. Sain, 372 U.S. 293, 307 (1963).

There can be no credible contention that this Court has limited its examination of the state court record to a search for evidence sufficient to meet the "clearly erroneous" test. On direct review, the Court has never considered the voluntariness of a confession to be a question of fact invoking any rule, explicit or implicit, limiting the scope of review. Justice Frankfurter's elaboration

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[4] This case presents no occasion for determining the precise relationship between the "clearly erroneous" test on direct review and the "fair support" standard in habeas.

of the elements of a confession case makes this plain. Culombe v. Connecticut, 367 U.S. 568, 603-605 (1961). Judge Gibbons' dissent below collects scores of cases to the same effect. 741 F.2d at 1477-1481.

There is no justification for treating the voluntariness of a confession as a legal or mixed issue on direct review, but treating the same question as one of historical fact in habeas corpus. Indeed, there are very good reasons for rejecting any such suggestion. First, a shifting definition of "fact" would create intense doctrinal confusion. The fact-law distinction is a valuable, if vexing, device. It would no longer be so if the definitions of fact and law were distorted by inconsistent application. Second, there is no warrant for any such course in the controlling statute. Section 2254(d) rests on the conventional understanding of the difference between fact and law and cannot

fairly be read to permit questions the drafters plainly considered to be legal or mixed issues to be treated as factual. Third, a shifting definition of "fact" would channel cases away from the habeas courts to this Court--the very danger that Congress intended to avoid by restricting the reach of § 2254(d).

III. THE COURT OF APPEALS' CHARACTERIZATION OF THE VOLUNTARINESS OF A CONFESSION AS A QUESTION OF HISTORICAL FACT CONFLICTS WITH THIS COURT'S PRECEDENTS.

The error below flows from two sources. First, the panel in this case was faced with an earlier panel opinion in Patterson v. Cuyler, 729 F.2d 925 (3d Cir. 1984), which badly misconceived this Court's recent decisions. Inasmuch as no petition for rehearing was filed in Patterson and the petitioner in that case failed to appeal, the panel in this case

was without power under local rules to re-examine the prior panel's position on the meaning of § 2254(d). Third Circuit Internal Operating Procedures Ch. VIII(c). Second, the panel in this case adopted a superficially appealing, but fundamentally flawed, rule which, in the Court of Appeals' view, reconciles Patterson with this Court's precedents. The Court of Appeals has it that all state court "findings dealing with a defendant's state of mind as such" are factual and subject to § 2254(d). 741 F.2d at 1462. If the Court does nothing else with the present appeal, it should disavow Patterson, which contains statements that are flatly inconsistent with what this Court has said in the current Term, and it should lay to rest the circuit's equally wrong "state of mind" rule--flatly rejected only last Term.

The Patterson panel accorded the § 2254(d) presumption to a state court

determination that the petitioner had "voluntarily waived" his right to remain silent. The panel did not propose that "waiver" is a question of historical fact. That would have been untenable in light of Brewer v. Williams, supra. Rather, the panel read this Court's decisions in Maggio v. Fulford, 462 U.S. 111 (1983); Marshall v. Lonberger, 459 U.S. 422 (1983); Rushen v. Spain, supra, and Sumner v. Mata, 455 U.S. 591 (1982), to mean that mixed questions of law and fact are subject to § 2254(d). The Patterson panel apparently overlooked Edwards v. Arizona, 451 U.S. 477 (1981), in which this Court both elaborated the proper standard for measuring "waiver" and applied that standard to the historical facts of the case at bar.[5]

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[5] As Judge Gibbons pointed out below, the Third Circuit has not itself considered whether Patterson can be squared with Edwards. 741 F.2d at 1483 n. 22. The answer is clear. This Court has since said explicitly what most courts had taken for

The panel in this case papered over Patterson's explicit reference to mixed questions and focused, instead, on the task of reconciling the decision in that case with a series of recent decisions from this Court. In addition to Fulford, Lonberger, Spain, and Mata, the panel relied upon Patton v. Yount, ___ U.S. ___, 104 S.Ct. 2885 (1984), and Pullman-Standard v. Swint, supra. At the time the panel opinion was written, Witt had not yet been decided. Standing back from the cases then on the books, and with a sharp eye on Patterson (controlling law in the Third Circuit), the panel attempted to pound the precedents into line behind its "state of mind" rule.

The Court of Appeals' decision is wrong

granted all along. "'[M]ixed determination[s] of law and fact' are not subject to the § 2254(d) presumption." Wainwright v. Witt, ___ U.S. ___, ___ n. 8, 105 S.Ct. 844, 854 n. 8 (1985).

and must be reversed. Yet we sympathize with that court's plight. This Court's recent decisions regarding § 2254(d) are troubling. The Court has too often given these important matters only summary treatment. The parties in Fulford did not raise the question whether a defendant's competency to stand trial is a legal or mixed issue. Yet this Court's per curiam treatment of that case included dicta to the effect that competency is entirely factual. That suggestion prompted four dissents. If the conventional definition of the term "fact" is to have meaning, and if Drope v. Missouri, 420 U.S. 162, 174-75 (1975), remains viable, the dicta in Fulford should be reassessed.

We have similar concerns regarding other recent decisions, specifically Lonberger, Spain, Yount, Witt, and some aspects of Mata. We agree with Justice Stevens that Lonberger, Spain, and Yount

were not correctly decided, Yount, 104 S.Ct. at 2898-99 & n. 6, and we agree with Justice Brennan that Witt illustrates an "expansive definition" of questions of fact, which threatens to "thwart vindication of fundamental rights in the federal courts." Witt, 105 S.Ct. at 872. The case at bar now is proof enough that the course of recent cases has not been true. The Court has an opportunity to clear the decks of some unfortunate lapses--and should use it.

Of course, the judgment below can be reversed without reexamining any precedent. The notion that the voluntariness of a confession is a question of historical fact constitutes a quantum leap beyond anything this Court has put in print and, as we have demonstrated, squarely conflicts with a long line of well-established decisions. A review of the faulty reasoning below makes this plain.

To begin, Pullman-Standard has nothing to do with the problem here. That was not a case about constitutional adjudication at all. The Court merely construed a particular federal statute, Title VII of the Civil Rights Act, to offer employees relief only if the district court found as a matter of historical fact that an employer's "actual motive" for acting was racial discrimination. The Court made it clear that it meant to decide nothing with respect to legal or mixed questions. 456 U.S. at 287-90 & n. 19. Unlike some circuit opinions mentioned in passing, Pullman-Standard did not confuse "ultimate" facts with the questions on which appellate courts exercise independent judgment. 456 U.S. at 286-87 n. 16.

Certainly, Pullman-Standard embraced no per se rule that anything "dealing" with a litigant's "state of mind" is a matter of

historical fact. Only last Term, this Court rejected such a superficial view in yet another case arising under Rule 52(a). The Court acknowledged in Bose Corp. v. Consumers Union, ___ U.S. ___, ___, 104 S.Ct. 1949, 1958 (1984), that it would not "stretch the language" of Rule 52(a) to "characterize an inquiry into what a person knew at a given point in time as a question of 'fact.'" Yet the Court rejected that very short-hand as insufficiently sensitive to the stakes in constitutional litigation and the consequent imperative that reviewing courts be permitted to examine the work of the trier of historical fact. 104 S.Ct. at 1960-61 & n. 17.

A close reading of this Court's recent cases on § 2254(d) reveals that the "state of mind" rule is grossly overbroad. Justice Powell's opinion in Yount is most helpful. That was a case about the alleged partiality of an individual juror. The

state trial judge found that the juror was not shown to be partial; this Court characterized that determination as one of historical fact subject to § 2254(d). While alleged partiality might well be understood as a "state of mind," the Court did not rest on such an abstraction in Yount. Nor did Justice Powell focus entirely on the fact-law distinction for guidance, without reference to the vital forum-allocation choice at stake in the case. He asked forthrightly whether it made sense to restrict federal review of this particular decision. He concluded that it did make sense. Both because the bias determination was made after voir dire in open court and because it turned upon the juror's credibility and demeanor, it was likely that the trial judge, who presided at the hearing and saw the witness, reached the correct decision.

This was not to defer wholesale to the

state courts. It was to explain why it made sense to limit the scope of the habeas courts' consideration of the partiality issue by treating that issue as one of historical fact within the meaning of § 2254(d). The question in Yount could be stated bluntly: "[D]id a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." 104 S.Ct. at 2891. Whether or not the juror gave the necessary assurances in a credible way was a matter of historical truth that could safely be entrusted to the trial court--provided, of course, that the process employed was adequate, the state court's determination was supported by the record, and the prisoner was unable to demonstrate by convincing evidence that it was wrong.

Similar thinking lay behind the Court's

per curiam in Spain. In that case, the state trial judge held a post-trial hearing to inquire into the effect that one juror's ex parte contacts with the judge might have had on the jury as a whole and determined as a matter of "fact" that there was no significant effect on the jury's impartiality. In Spain, as in Yount, the state court determination given the benefit of the § 2254(d) presumption was fused with that court's credibility choices. The question was whether a witness truthfully explained her feelings and behavior. The state judge, who saw the witness testify in open court, was in an excellent position to make that decision.

Similarly in Fulford, the state trial judge determined on the basis of evidence offered in court and his own court-room observations that the defendant was competent to participate in his own defense. That determination could not be

separated from its several parts--the trial judge's impressions regarding the defendant's capacity culled from close observations in the court room, his knowledge that the defendant had misled a defense psychiatrist to believe that he was withholding the names of alibi witnesses, and his determination that the defense motion for a competency hearing, offered with no warning on the morning of trial, was a subterfuge in aid of winning a severance. All those matters turned on the trial court's appraisal of the truthfulness of what he was being shown and told by the defense.

Justice Rehnquist's recent opinion for the Court in Witt, an opinion not available to the Court of Appeals below, is to the same effect. The issue in Witt was whether a potential juror was properly excused for bias in a death penalty case. Once again, the state trial court's predominant

function was to observe the witness under interrogation in the open court room and to determine the credibility and "real character" of her words. 105 S.Ct. at 855 & n. 9, quoting Reynolds v. United States, 98 U.S. 145, 156-57 (1879).

On a deeper level in Witt, Justice Rehnquist explained why it is that decisions so closely linked with credibility choices require only limited review. Witnesses' words, recorded and transcribed for a reviewing court, may not capture all the meaning that those who heard those words and saw the witness utter them gleaned from the experience. The trier of fact may be left with a definite impression about the witness' true feelings that is not revealed by the cold record. This, Justice Rehnquist made clear in Witt, is why credibility choices like those in Yount, Spain, Fulford, and Witt itself are subject to the presumption in § 2254(d).

State court credibility choices also played a role in Lonberger, the one decision in this series that bears upon the case at bar. The fact-law distinction posed no significant difficulty in the case. The Ohio court reviewed documents from earlier judicial proceedings in Illinois, took the defendant's testimony regarding his memory of events in Illinois, and then concluded that the guilty plea the defendant entered was voluntary. No one proposed that the voluntariness determination was itself a matter of historical fact. Justice Rehnquist confirmed that "the governing standard as to whether a plea of guilty is voluntary for purposes of the federal Constitution is a question of federal law...and not a question of fact subject to ... 2254(d)."

459 U.S. at 431.[6]

The state court finding of historical fact given the benefit of the § 2254(d) presumption in Lonberger was that court's implicit determination that the petitioner knew at the time of his plea in Illinois that he was pleading to attempted homicide. The defendant's cognitive command of that item of information was a matter of historical fact--determined by the Ohio court after taking the defendant's testimony, observing his demeanor, and further testing his credibility against relevant documents from Illinois. No one

[5] In support, he cited Henderson v. Morgan, 426 U.S. 637 (1976), in which this Court distinguished cleanly between the historical facts relevant to the voluntariness issue (whether the defendant had been advised of the sentence that would be imposed and whether he had been advised that an intent to cause death was an essential element of the offense charged) and the voluntariness question itself (whether the courts below had "correctly held the plea invalid as a matter of law"). Id. at 641.

doubted this characterization in Lonberger. The dispute was over the Sixth Circuit's decision that the state court's finding regarding the defendant's knowledge lacked "fair support" in the record.

This Court's treatment of Mata is in the same vein. State court findings regarding the circumstances of witnesses' observation of a crime, the descriptions those witnesses gave of the perpetrator, and the witnesses' exposure to pressure were subject to § 2254(d). But the "ultimate question as to the constitutionality of the pretrial identification procedures used in [the] case [was] a mixed question of law and fact...not governed by § 2254." 455 U.S. at 597.

The Court of Appeals' sweeping "state of mind" rule misses the point of these recent cases. It is one thing to treat as a question of historical fact a state

court's determinations regarding the "real character" of a witness' words, actions, and feelings in the here and now. Especially when determinations of that kind are made after testimony in open court in which the state court can observe and appraise witnesses' behavior and demeanor, the state court is well-situated to make accurate judgments touching credibility. That being true, the characterization of those determinations as factual invokes § 2254(d), which, in turn, adjusts the burden and standard of proof in federal habeas proceedings to take account of ostensibly reliable state court findings. It is quite another thing to propose that state court applications of legal standards to congeries of historical facts can be treated in the same way simply because they "deal" in some rough fashion with an individual's "state of mind."

The voluntariness of a confession presents just such a law-application issue. Courts do not simply ask defendants in the dock whether they acted voluntarily and arrive at conclusions according to whether those defendants are deemed to be telling the truth. Courts inquire not into the defendant's current "state of mind," but into historical events--taking testimony about what occurred, when it occurred, how it occurred, and the like. Once the historical facts are determined, courts apply the operative legal standard, voluntariness, and decide as a matter of law whether the due process clause permits the use of the confession at trial. Credibility choices are made when conflicting testimony regarding historical events is sorted out and the historical facts are determined. And for the reasons this Court has repeated on numerous occasions those credibility choices are

entitled to the respect they enjoy pursuant to § 2254(d). At the further stage at which courts determine the voluntariness of a confession, however, they are no longer evaluating the truthfulness of testimony but are determining the legal significance of what they have decided <u>is</u> the truth. This is the application of legal standards. And for all the reasons this court has repeatedly given, voluntariness determinations are <u>not</u> subject to § 2254(d) but, instead, are open to independent federal judgment.

This case is typical. There is no dispute regarding what happened in the interrogation session with Miller. No state court credibility choices are at stake. The recording and transcript of the interrogation session establish the historical facts. The issue is the legal significance of those facts. This is the way in which all the state court judges who

struggled with the voluntariness issue in this case understood it, the way in which this Court has always understood it, and the way in which the Court of Appeals below should have understood it.

CONCLUSION

No short-hand rule can be employed with confidence--apart from a serious consideration of the forum-allocation function of the fact-law distinction. If, however, any formulation captures the definition of the legal or mixed issue in confession cases, it is the one this Court has itself used for decades. When state court determinations "imply the application of standards of law," they are not findings of historical fact, but conclusions of law. Pullman-Standard v. Swint, 456 U.S. 273, 286-87 n. 16 (1982), quoting Baumgartner v. United States, 322 U.S. 665, 671 (1944).

Amici respectfully pray, for the

reasons stated in Judge Gibbons dissent below, that the judgment below be reversed. In the alternative, the Court should vacate the Court of Appeals' judgment and remand with directions to adjudicate the petitioner's legal claim afresh. Those directions should include a clear statement that the voluntariness of a confession is a legal or mixed question rather than a question of historical fact. The Court of Appeals should be instructed to abandon its "state of mind" rule.

We recognize that the Court of Appeals stated that it would have denied relief in this case even if it had exercised independent judgment on the voluntariness issue. 741 F.2d at 1467 n. 21. It can hardly be doubted, however, that the two judges who joined in that statement were greatly influenced by their erroneous understanding of § 2254(d).

Respectfully submitted,

Larry W. Yackle
Boston University
School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
617/353-4688

Charles S. Sims,
Counsel of Record
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
212/944-9800

Counsel for Amici Curiae

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